TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 846.

HARRY T. GRAHAM, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, ET AL., PETITIONERS,

vs.

ALFRED I. DU PONT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 12, 1923.
CERTIORARI AND RETURN FILED MARCH 22, 1923.

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INDEX.

Record from United States District Court for the District of Delaware—Continued.

1 UNITED STATES OF AMERICA.
District of Delaware, ss.:

Be it remembered, that at a District Court of the United States of the District of Delaware, begun and held at the United States court-house and post-office building, in the city of Wilmington, in the said district of Delaware, at the time and place required by law, among other, the following proceedings were had, to wit:

ALFRED I. DUPONT, COMPLAINANT, *vs.* HARRY T. GRAHAM, INDIVIDUALLY AND AS COLLECTOR of internal revenue for the district of Delaware, and JOHN W. HERING, INDIVIDUALLY AND AS UNITED States collector of internal revenue for the district of Delaware, and his successor in office, defendants.	No. 547. In equity.

Docket entries.

Jan. 30, 1922. Bill of Complaint, with Exhibit "A," filed: same day subpœna issued, returnable February 20, 1922.
Jan. 30, 1922. Affidavit of Alfred I. duPont, filed.
Jan. 30, 1922. Certificate of disqualification of Hon. Hugh M. Horris, filed. (Exit copy to circuit judge.)
Jan. 31, 1922. Motion for preliminary injunction filed: same day order setting same down for hearing February 14, 1922, at 10 o'clock a. m., that defendant file his
2 affidavits on or before February 8, 1922: that complainant file reply affidavits on or before February 11, 1922: and that marshal serve defendant, &c.: same day said order filed. (Exit copy to marshal.)
Feb. 3, 1922. Defendant appears, by James H. Hughes, jr., Esq., United States attorney: same day præcipe filed.
Feb. 6, 1922. Order continuing hearing on motion for preliminary injunction until March 3, 1922, and extending time for filing affidavits, &c.: same day said order filed. (Exit copy to solicitors.)
Feb. 8, 1922. Marshal returns on subpœna, copy of motion and copy of order, "Served," &c.: same day said writ and copies filed.
Feb. 14, 1922. Motion to dismiss bill, filed.
Feb. 14, 1922. Affidavit of Harry T. Graham, with Exhibits Nos. 1 to 19, inclusive, filed by defendant.
Feb. 16, 1922. Order extending time for filing answer until March 10, 1922: same day said order filed. (Exit copy to solicitors.)
Mar. 3–4, 1922. Hearing on motion for preliminary injunction and motion to dismiss bill of complaint.

June 13, 1922. Opinion of court, filed.
June 20, 1922. Order extending time for filing answer until thirty days after entry of decree granting injunction, &c.; same day said order filed.
June 27, 1922. Motion of plaintiff for leave to amend bill, filed.
June 27, 1922. Order that John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, be made party defendant;
3 that motion to dismiss bill of complaint be overruled and that defendants be enjoined, &c.; same day said order filed.
July 25, 1922. Petition of defendants, with assignments of error, filed; same day order allowing appeal; same day said order filed.
July 25, 1922. Citation issued.
July 25, 1922. Order extending time for filing answer; same day said order filed.

4 *Bill of complaint.*

(Filed January 30, 1922.)

In the District Court of the United States for the District of Delaware.

(Title omitted.)

Bill in equity.

To the judge of the District Court of the United States for the District of Delaware:

Complainant, Alfred I. duPont, complains and says:

1. That he is a citizen, resident, and inhabitant of Brandywine Hundred, New Castle County, in the State and judicial district of Delaware.

2. That defendant is a citizen, resident, and inhabitant of New Castle County and judicial district of Delaware, and is collector of internal revenue for the United States in and for the district of Delaware.

3. That this is a suit of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and arises under the laws of the United States.

4. That the E. I. duPont de Nemours Powder Company (hereinafter called the New Jersey Company) was incorporated in the year 1903 under the laws of the State of New Jersey, and was engaged up to the 1st of October, 1915, in the manufacture and sale of powder, dynamite, and other explosives, and on the 1st day
5 of October, 1915, the New Jersey Company, in pursuance of "a plan of financial reorganization," transferred its assets as

an "entirety" and "as a going concern" to E. I. duPont de Nemours & Company (hereinafter called the Delaware Company) organized under the laws of the State of Delaware, and which latter company thereafter conducted the same business.

5. That complainant on September 30, 1915, and from the date of the organization of the New Jersey Company was the owner of 37,767 shares of the common stock of said company, and from the year 1912 all of said shares of stock stood in his own name on the books of the company.

6. That in consideration of the transfer of its assets, good will, etc., to the Delaware Company, the New Jersey Company received on October 1, 1915, 596,617 shares of the debenture stock and 588,542 shares of the common stock of the Delaware Company, each share of debenture and common stock being of the par value of $100.00, and making a total in par value of $118,515,900, of which stock so received $30,234,600, in par value, of the debenture stock was used in taking up, share for share, and dollar for dollar, the preferred stock and thirty-year bonds of the New Jersey Company, and the remainder of the debenture stock, to wit, $29,427,100 in par value, was held in the treasury of the New Jersey Company. The common stock of the Delaware Company, of the par value of $58,854,200, was distributed immediately among the common stockholders of the New Jersey Company, each stockholder receiving two shares of the common stock of the Delaware Company for each share of common stock held by him in the New Jersey Company. In this distribution complainant received, on or about October 1, 1915, a total of 75,534 shares of the common stock of the Delaware Company, of the par value of $100 per share.

6 7. That when this plan of financial reorganization was proposed to the stockholders of the New Jersey Company, complainant objected thereto on the grounds, among others, that (1) there was no necessity or occasion for such reorganization, and (2) that the assets proposed to be turned over to the Delaware Company did not in value justify the issue by that company of this stock in the amount of $118,515,900 par value; but complainant was informed by the treasurer of the New Jersey Company that the latter objection could be met by writing up on the books of the company the value of profits which the company expected to make in the manufacture of powder and explosives under certain contracts with the Allies engaged in the European war, thus making the assets appear on the books equal on October 1, 1915, to the par value of the stock issued by the Delaware Company. The contracts aforesaid were unperformed and on a great number of them deliveries were not to be begun until February, 1916.

Complainant continued, however, to object to such reorganization until the same was approved by two-thirds in amount of the stockholders, and then he acquiesced therein at the personal request of the officers of the company to avoid any appearance of dissension.

Complainant is informed by an examination of the books that the value of profits which the company expected to make on the contracts aforesaid was in fact written up on the books of the company on or about October 1, 1915, in the sum of $29,152,116.75, in order to apparently show on the books of the company the assets to be equal in value to the common stock of a total par value of $58,854,200 of the Delaware Company, at its par value of $100 per share.

8. That on March 1, 1916, complainant, as required by the act of October 3, 1913, made his personal return of total net income accruing to him during the calendar year 1915, and to said
7 return, as complainant believes, attached a statement in writing fully setting forth the entire transaction under which he received the 75,534 shares of common stock of the Delaware Company aforesaid, and protesting "against the inclusion of said stock in his income tax for said year" 1915. A copy of said statement is hereto attached as Exhibit A and as a part of this bill.

9. Complainant is informed, believes, and therefore charges that 95% of the stockholders, including all of the large stockholders of the Delaware Company, attached a like statement to their and each of their personal returns of total income for the year 1915, filed on March 1, 1916. Complainant's return aforesaid was duly filed by him with the collector of internal revenue for the district of Delaware on March 1, 1916, and was duly forwarded by said collector as the law requires to the Commissioner of Internal Revenue at Washington, District of Columbia.

10. That on the 30th day of June, 1916, the entire tax for which complainant was liable by reason of net income accruing to him in the calender year 1915, was due and payable to the collector of internal revenue for the district of Delaware, and on or about said date complainant paid to said collector the entire amount due by him as aforesaid as and for tax upon personal income accruing to him in the year 1915, as shown by the return made by complainant as aforesaid.

11. Complainant is informed, believes, and therefore charges that the Commissioner of Internal Revenue was only authorized by law to make a return for complainant charging him with receiving additional income to that shown upon his return for the year 1915, in case the return filed by complainant on March 1, 1916, was "false or fraudulent," and in case the return was "false or fraudulent" in law, then the Commissioner of Internal Revenue was not authorized by law to "make a return" for complainant or to collect a tax
8 from complainant in addition to that shown on his return and paid by him, unless the commissioner makes such return for complainant and issues an assessment thereon "within three years after said return" made by complainant is "due," to wit, within three years after March 1, 1916; and complainant charges that neither the commissioner nor the collector or deputy collector made such return for complainant upon which to issue or base an additional assessment within three years after the said March 1, 1916.

12. Complainant further shows that upon his making his return on the 1st of March, 1916, with the statement (Exhibit A) attached thereto, the collector of internal revenue for the district of Delaware, and the Commissioner of Internal Revenue were both fully informed as to the shares of common stock of the Delaware Company received by complainant on October 1, 1915, and the circumstances under which the said stock was received, and the commissioner was only authorized by law to "make a return for complainant," and assessment thereon, "within three years" after March 1, 1916, when complainant's return was made and when the commissioner was furnished with full information as to the common stock of the Delaware Company received by complainant and the circumstances under which it was received. Complainant charges that neither the Commissioner of Internal Revenue, nor the collector or deputy collector, made a return for complainant, and no assessment was made against him for additional income tax for the year 1915 within three years after March 1, 1916.

13. Complainant says that he made his return on March 1, 1916, in accordance with the act of October 3, 1913, of personal income accruing or received by him in the calendar year of 1915; that said return was not "false or fraudulent" in any sense other than that it was incorrect; that the Commissioner of Internal Revenue discovered on March 1, 1916, from complainant's return and the statement thereto attached, that he had not included in his return 75,534
9 shares of common stock of the Delaware Company received by him on October 1, 1915; that neither the Commissioner of Internal Revenue, nor the collector or deputy collector, has made a return for complainant of income received by him for the year 1915, and no assessment could lawfully be made against complainant until the commissioner or collector or deputy collector first made such return for complainant; and that no return was made for complainant within three years from March 1, 1916, the date at which the commissioner was informed that complainant received the shares of common stock of the Delaware Company aforesaid; that no return was made for complainant, and no assessment for additional income made by the commissioner against complainant within three years after the return of complainant was "due" and filed by complainant on March 1, 1916. And thereupon complainant charges that no basis existed upon which the commissioner was authorized to assess additional income tax against complainant for the year 1915, and that under the circumstances above set forth the commissioner was not authorized by law after the 1st of March, 1919, to assess complainant with additional income tax for the year 1915 by reason of his having received the common stock of the Delaware Company aforesaid.

14. Complainant further says that on the 1st day of January, 1920, he received the first communication from the collector of internal revenue indicating any purpose to charge complainant with additional income tax for the year 1915. That on that date he received

through the mails a notice and demand dated December 31, 1919, that complainant pay to H. T. Graham, collector of internal revenue at Wilmington, Delaware, on or before January 10, 1920, the sum of $1,576,015.86 for income tax for the year 1915; upon receipt of which said notice and demand complainant immediately wrote to the collector of internal revenue at Wilmington, Delaware, protesting against the bill aforesaid, on the ground that the demand for payment by him of additional income tax for the year 1915 was
10 improper and illegal under the act of October 3, 1913, and that the commissioner had no power under the law to demand the payment of the sum above mentioned or any part thereof.

Whereupon, on the 24th of January, 1920, complainant was informed in a letter from the Acting Assistant to the Commissioner of Internal Revenue that the commissioner claimed that he was liable for the additional tax in the sum of $1,576,015.86, and demanding payment thereof.

Complainant charges that no return had been made for him by the commissioner in accordance with the terms of the act of October 3, 1913; and complainant is informed and therefore charges that the notice and demand dated December 31, 1919, aforesaid was made upon the complainant charging that he had received on the 1st of October, 1915, 75,534 shares of the common stock of the Delaware Company in accordance with the circumstances above set forth, and further, that said stock on that day was of the fair value of $347.50 per share, and that therefore complainant had received $26,248,065 of personal income in the year 1915 in addition to the income shown upon the return filed by complainant as aforesaid. Complainant charges that the commissioner had no power in law to make the notice and demand upon complainant for the payment of the additional tax aforesaid, and that the commissioner acted without warrant of law for the following reasons, to wit:

1. The commissioner or collector or deputy collector at no time made a return upon information for complainant as to additional income received by him in the year 1915.

2. That under the act of October 3, 1913, and the law, no assessment for additional income tax could be made by the Commissioner of Internal Revenue until "a return upon information" had been made for complainant.

11 3. That the notice and demand dated December 31, 1919, was made upon complainant more than three years after the commissioner was informed and discovered that complainant had received the 75,534 shares of the common stock of the Delaware Company, as aforesaid.

4. That said notice and demand dated December 31, 1919, was made more than three years after the 1st of March, 1916, at which date complainant's return of income accruing to him for the year 1915 was "due" and actually filed by complainant.

Therefore, complainant charges that in making the demand upon complainant for the sum of $1,576,015.86 as additional income tax for

the year 1915, the Commissioner of Internal Revenue acted unlawfully, illegally, and without warrant of law.

15. Complainant was further informed by letter dated January 24, 1920, from the Acting Assistant to the Commissioner of Internal Revenue, that the commissioner renewed his demand for the payment of the $1,576,015.86 by complainant as additional income tax, and informed complainant that unless he paid the same collection would be made thereof by the collector for the district of Delaware "through distraint": and thereupon complainant filed a claim in abatement of said tax, which said claim was duly referred to the Commissioner of Internal Revenue and has been overruled by him.

16. That on November 23, 1921, Congress passed an act known as "the revenue act of 1921." By said act, section 250–d, it is provided as to demands for taxes made under that act "for prior taxable years or under any prior income excess-profits or war-profits tax acts" or under section 38 of the act approved August 5, 1909, that:

"No suit or proceeding for the collection of any such taxes due under this act or under any prior income excess-profits or
12 war-profits tax acts or of any taxes due under section 38 of such act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this act."

Complainant charges that no "suit or proceedings" was "begun" against him prior to the passage of the act of November 23rd, 1921, for the collection of any additional income tax for the year 1915, and that he has not consented in writing or otherwise to any "determination, assessment, and collection" of any additional income tax upon him for the year 1915. And complainant therefore charges that any claim of additional income tax for the year 1915 is, under the provision of the act aforesaid of November 23, 1921, barred after five years from the 1st day of March, 1916, the day upon which his return for 1915 was filed, and that no "suit or proceeding" can be lawfully begun against him for the collection thereof after the 1st day of March, 1921.

17. Complainant further shows that by section 1320 of the act known as "the revenue act of 1921," approved November 23, 1921, it is provided:

"That no suit or proceeding for the collection of any internal-revenue tax shall be begun after the expiration of five years from the time such tax was due, except in the case of fraud with intent to evade tax or willful attempt in any manner to defeat or evade tax. This section shall not apply to suits or proceedings for the collection of taxes under section 250 of this act, nor to suits or proceedings begun at the time of the passage of this act."

Complainant further says that any tax for which he was liable on account of net income accruing to him for the year 1915 was due and payable "on or before the 1st day of June," 1916, and complainant shows that he has not been guilty of "fraud with intent to

13 evade tax," nor has he been guilty of "willful attempt in any manner to defeat or evade tax"; and complainant shows that no "suits or proceedings" had been "begun" against him for the collection of any additional income tax for the year 1915 at the time of the passage of "the revenue act of 1921," approved November 23, 1921; and, therefore, complainant charges that any "suit or proceeding" by the Commissioner of Internal Revenue or the collector of internal revenue for the district of Delaware against complainant for additional income tax for year 1915 is forever barred by the provisions aforesaid of the act of 1921.

18. Complainant charges that the collector of internal revenue for the district of Delaware intends to proceed by distraint or otherwise to collect from complainant the $1,576,015.86 referred to in the notice and demand of December 31, 1919, and that the said collector will proceed to collect the same by distress and sale of complainant's lands and freehold in the district of Delaware, and that said demand on the part of the Commissioner of Internal Revenue constitutes a cloud upon the lands and freehold of complainant situate in Brandywine Hundred, New Castle County, Delaware; and that if the commissioner proceeds to collect said demand by distress and sale of complainant's land and freehold that the loss of his said freehold by means of a tax sale would be an irreparable damage to complainant. That by reason of the long delay on the part of the Commissioner of Internal Revenue, the 75,534 shares of common stock of the Delaware Company received by complainant on October 1, 1915, and now held by complainant are not salable, that no market can at present be found for said stock, and that complainant will be unable by the use of said stock to secure the money to prevent the sale of his freehold estate upon such distraint.

Complainant further shows that the act of 1921 and the sections above quoted forever bar the Collector of Internal Revenue from proceeding by distraint to collect the $1,576,015.86, or any part
14 thereof, claimed by said Commissioner of Internal Revenue, but if the said collector should collect said tax by unlawful distraint upon complainant's property in violation of his duty, and in violation of the act of November 23, 1921, aforesaid, complainant's right to recover in a suit at law the said amount unlawfully collected and distrained as aforesaid by the collector is so doubtful that complainant would be irreparably injured and damaged by permitting the distraint upon his property as aforesaid.

Complainant says that section 3225 of Revised Statutes, as amended by the "Revenue act of 1921," is as follows:

"When a second assessment is made in case of any list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contains any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded or paid back or recovered by any suit unless it is proved that such list, statement, or return was

not willfully false or fraudulent, and did not contain any willful understatement or undervaluation."

This same amendment of section 3225 was in the "revenue law of 1918."

Therefore, if by distraint upon complainant's property the collector should collect the additional tax claimed by him for the year 1915, by sale of complainant's property, or if complainant should pay the same under duress and under protest, complainant would be deprived of the right given him by the act of November 23, 1921, and he would be barred from recovering the money collected by the collector, as aforesaid, in case it should be held that the return made by complainant on March 1, 1916, was "willfully" incorrect and in that sense "willfully" false, and would further be deprived of the right given him by the act of November 23, 1921, if it should be held
15 that complainant's return was willfully incorrect and that it contained a willful understatement of income, in that the Supreme Court in the case of the United States vs. Phellis has held that the common stock received by the complainant on October 1, 1915, was taxable under the act of October 3, 1913, and, therefore, under this decision of the Supreme Court complainant's return made on March 1, 1916, was incorrect in not including said common stock.

The act of November 23, 1921, gives to the complainant the right to hold his property free of any suit or proceeding by the said collector by levy upon and sale of the same for income tax claimed against complainant for the year 1915, and if the collector can proceed by distraint to collect the same, complainant is irreparably deprived of the forum in which to assert his right under the said act of 1921 or to recover the tax collected by the collector in violation of the act of November 23, 1921.

Complainant further charges that the 75,534 shares of common stock of the Delaware Company received by him on the 1st day of October, 1915, was not of a fair value in excess of $50.00 per share, and yet the Commissioner of Internal Revenue has charged complainant with the value thereof as of October 1, 1915, at $347.50 per share.

19. Complainant says that the return required of him by the act of October 3, 1913, of net income accruing to him in the year 1915, was due on March 1, 1916, and complainant on that day made his return as required by law.

Complainant further shows that by section 3226 of the Revised Statutes, as amended by section 1318 of the "revenue act of 1921," it is provided that—

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed
16 to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or for credit has been duly filed with the Commissioner of Internal Revenue, according to the pro-

visions of law in that regard or the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."

Complainant further shows that by section 252 of the revenue act of 1918, it is provided—

"That if upon examination of any return of income made pursuant to * * * the act of October 3, 1913, * * * it appears that an amount of income * * * tax has been paid in excess of that properly due then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income * * * taxes or instalments thereof then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer. Provided that no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

The above section 252 of the act of 1918 was reenacted as section 252 of the "revenue act of 1921."

Complainant therefore says that if the collector of internal revenue for the district of Delaware is now permitted to collect the
17 $1,576,015.86 as and for additional income tax against complainant for the year 1915 that complainant, by the delay of the Commissioner of Internal Revenue in assessing and collecting such tax, the amount whereof is in excess of that properly due, is not permitted under the provisions of law above set forth to file with the commissioner a claim for refund of the excess amount of said tax properly due, in that more than five years since the date "when the return was due" by complainant on March 1, 1916, have elapsed; and by the delay of the commissioner, complainant will be deprived of any remedy for the collection and return of the excess taxes collected from complainant for the year 1915.

20. Complainant further says that while the law gives him a right of action to recover taxes erroneously or illegally assessed or collected, provided he proceeds within the proper time by claim for refund thereof, yet the revenue act of 1921 does not give to the complainant a right of action to recover taxes which are collected by distraint or otherwise by the collector of internal revenue in violation of the limitations provided by the revenue act of 1921; and if the collector of internal revenue for the district of Delaware should proceed in violation of the revenue act of 1921, and collect the income tax for the year 1915 against complainant by the sale of his property or otherwise, it is very doubtful whether complainant would have a right of action against the collector to recover the amount so collected, on the ground that the collector had proceeded in violation of the limitations contained in the "revenue act of 1921."

21. Complainant further shows that while section 3224 of the Revised Statutes of the United States provides that—

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,"

that the provision of this section must be read in the light of the subsequent act of Congress of November 23, 1921, which for-
18 ever bars the Commissioner of Internal Revenue from the assessment or collection of any tax against complainant for income received by him in the year 1915, and Congress has modified to this extent section 3224 of the Revised Statutes, and complainant is entitled to the full benefit of his right given by that act, and to prevent in a court of equity the distraint upon his property by the collector of Internal Revenue for the district of Delaware for the collection of the tax against him for the year 1915.

22. By the act of Congress of November 23, 1921, it was provided that "no suit or proceeding shall be begun" to collect the claim of the Commissioner of Internal Revenue against complainant for additional income tax for the year 1915, and this is a right given to complainant to hold his property free from distraint by the collector for the collection of said claim.

Complainant says that he is now threatened with such distraint, and that he has no other remedy to enforce his said right except in this court of equity, and without the aid of this court on the present bill complainant will be forever deprived of the right given him by the act of Congress aforesaid and he will be irreparably damaged.

Inasmuch, therefore, as complainant is without sufficient remedy at law, and that the distraint against him by the collector of internal revenue for the district of Delaware for the collection of $1,576,015.86, or any part thereof, would irreparably injure complainant and deprive him of the right given to him under the act of November 23, 1921, complainant prays that this honorable court will grant the complainant an injunction, preliminary until final hearing, and perpetual thereafter, enjoining and restraining Harry T. Graham, individually and as collector of internal revenue for the district of Delaware, from distraining or attempting to distrain or collect from complainant or his property the said sum of $1,576,015.86, or any part thereof,
19 as or for income tax for the year 1915; and that this court will enter its decree upon final hearing, declaring that the Commissioner of Internal Revenue has no right, power, or authority in law to require complainant to pay to the collector of internal revenue for the district of Delaware any tax or assessment on account of income received by complainant for the year 1915, and that the court grant such other, further, and general relief as may seem just and equitable; and complainant will ever pray, etc.

(Signed) WM. A. GLASGOW, JR.,
(Signed) HENRY P. BROWN,
(Signed) ROBERT PENINGTON,
Counsel for Complainant.

STATE OF PENNSYLVANIA, COUNTY OF PHILADELPHIA, to wit:

Alfred I. duPont, being duly sworn, deposes and says that he has read the foregoing bill; that he knows the facts therein set forth, and that the same are true to the best of his knowledge and belief.

(Signed) ALFRED I. DUPONT.

Subscribed and sworn to before me, a notary public in and for the county and State aforesaid, this 30th day of January, 1922.

[SEAL.] (Signed) EDITH W. SMELTZER,
Notary Public.

My commission expires the 7th day of March, 1925.

"Exhibit A" to Bill of Complaint.

Statement.

In September, 1915, the stockholders of E. I. duPont de Nemours Powder Company, a New Jersey corporation, caused a reorganization of the business of said company to be made. At that time the company had outstanding the following stocks and bonds:

294,271 shs. com. stock, per $100	$14,166,000—4½% 30-year bonds.
160,686 shs. pfd. stock, per $100	1,230,000—5% mortgage bonds.
454,957	15,396,000

The business had been carried on for a great many years and in September, 1915, had as capital and accumulated surplus employed in the business of manufacturing and selling explosives about $95,000,000. The stockholders, substantially all assenting thereto, organized a new corporation under the laws of Delaware, under the name of E. I. duPont de Nemours & Company, with an authorized capital of $240,000,000 divided into 1,600,000 shares 6% debenture stock and 800,000 shares common stock, both of the par value of $100 each.

All the assets and good will of the old company were transferred as an entirety and a going concern to the new company October 1, 1915, the new company assuming all the liabilities of the old company, except capital stock and funded debt. In return therefore the old company received $1,484,100 in cash to be used in the redemption of its outstanding 5% mortgage bonds, $59,661,700 par value in debenture stock of the new company, of which $30,234,600 were to be used in taking up share for share, and dollar for dollar, the 160,686 shares of the preferred stock of the old company and the 14,166 4½% 30-year bonds then outstanding against said old company, and $58,854,200 par value of the common stock of the new company for immediate distribution among the stockholders of the old company.

The personnel of the stockholders, directors, and officers of the new company on the date of the transfer were the same as that of the old company. Upon receipt by the old company of the cash and

stock aforesaid it distributed to its stockholders two shares of the common stock in the new company for each one share of com-
21 mon stock of the old company held by its stockholders respectively. The old company also proceeded to and has at this date redeemed in cash all its outstanding 5% mortgage bonds, and has by an exchange of debenture stock therefor taken up substantially all of its outstanding preferred stock and all but about $2,000,000 of its 4½% bonds. Since October 1, 1915, it has transacted no business other than that incidental to the redemption of its securities as aforesaid, and is now in process of liquidation.

Under the common-stock distribution aforesaid the undersigned, a stockholder of the old company, received in October, 1915, shares of the common stock of the E. I. duPont de Nemours & Company at par, which stock so received the undersigned contends it is not income, taxable or otherwise, received by him during the year 1915 within the purview of the act of Congress, approved October 3, 1913, and, therefore, the undersigned has not included said stock in his income tax return for said year, and hereby protests against the inclusion of said stock in his income tax return for said year.

Dated _____ Signed _____

Seal of the District Court in Delaware.

Affidavit of Alfred I duPont.

(Filed January 30, 1922.)

Alfred I. duPont, being duly sworn according to law, deposes and says that he is the owner of 75,534 shares of the common stock of the E. I. duPont de Nemours & Company, a corporation which was organized under the laws of the State of Delaware (hereinafter called the Delaware Company).

That on October 1st, 1915, the E. I. duPont de Nemours Powder Company of New Jersey (hereinafter called the New Jersey Company), which was incorporated in 1903, conveyed all of its
22 assets as an "entirety" and "as a going concern" to the Delaware Company. The business of the New Jersey Company was the manufacture of powder and explosives, and this same business had been conducted for over one hundred years in the State of Delaware, and since October 1, 1915, has been conducted by the Delaware Company.

That on September 30th, 1915, and from the date of the organization of the New Jersey Company, he was and has been the owner of 37,767 shares of the common stock of said company, and from the year 1912 all of said shares of stock have stood in his own name on the books of the company.

That in consideration of the transfer of its assets, good will, etc., to the Delaware Company, the New Jersey Company received on October 1, 1915, 596,617 shares of the debenture stock and 588,542 shares of the common stock of the Delaware Company, each share

of debenture and common stock being of the par value of $100, and making a total in par value of $118,515,900, of which stock so received $30,234,600, in par value, of the debenture stock was used in taking up, share for share, and dollar for dollar, the preferred stock and thirty-year bonds of the New Jersey Company, and the remainder of the debenture stock, to wit, $29,427,100, in par value was held in the treasury of the New Jersey Company. The common stock of the Delaware Company of the par value of $58,854,200 was distributed immediately among the common stockholders of the New Jersey Company, each stockholder receiving two shares of the common stock of the Delaware Company for each share of common stock held by him in the New Jersey Company. In this distribution the affiant received on or about October 1, 1915, a total of 75,534 shares of the common stock of the Delaware Company of the par value of $100 per share.

That when this plan of financial reorganization was pro-
23 posed to the stockholders of the New Jersey Company the affiant objected thereto on the grounds, among others, that (1) there was no necessity or occasion for such reorganization, and (2) that the assets proposed to be turned over to the Delaware Company did not in value justify the issue by that company of this stock in the amount of $118,515,900 par value; but the affiant was informed by the treasurer of the New Jersey Company that the latter objection could be met by writing up on the books of the company the value of profits which the company expected to make in the manufacture of powder and explosives under certain contracts with the Allies engaged in the European war, thus making the assets appear on the books equal on October 1, 1915, to the par value of the stock issued by the Delaware Company. The contracts aforesaid were unperformed and on a great number of them deliveries were not to be begun until February, 1916.

That affiant continued, however, to object to such reorganization until the same was approved by two-thirds in amount of the stockholders, and then he acquiesced therein at the personal request of the officers of the company to avoid any appearance of dissension.

The affiant is informed by an examination of the books made by Lyebrand, Ross Bros., and Montgomery, certified public accountants, the value of profits which the company expected to make on the contracts aforesaid was in fact written up on the books of the company on or about October 1, 1915, in the sum of $29,152,116.75, in order to apparently show on the books of the company the assets to be equal in value to the common stock of a total par value of $58,854,200 of the Delaware Company at its par value of $100 per share.

That on March 1, 1916, the affiant, as required by the act of October 3, 1913, made his personal return of total net income accruing to him during the calendar year 1915, and to said return attached
a statement in writing fully setting forth the entire trans-
24 action under which he received the 75,534 shares of common stock of the Delaware Company aforesaid, and protesting

"against the inclusion of said stock in his income tax for said year," 1915. A copy of said statement is attached as Exhibit "A" to the bill filed in the above case.

The affiant is informed and believes that 95% of the stockholders, including all of the large stockholders of the Delaware Company, attached a like statement to their and each of their personal returns of total income for the year 1915, filed on March 1, 1916. Affiant's return aforesaid was duly filed by him with the collector of internal revenue for the district of Delaware on March 1, 1916, and was duly forwarded by said collector, as the law requires, to the Commissioner of Internal Revenue at Washington, District of Columbia.

That on the 30th day of June, 1916, the entire tax for which affiant was liable by reason of net income accruing to him in the calendar year 1915 was due and payable to the collector of internal revenue for the district of Delaware, and on or about said date affiant paid to said collector the entire amount due by him as aforesaid as and for tax upon personal income accruing to him in the year 1915, as shown by the return made by affiant as aforesaid.

That the Bureau of Internal Revenue considered for some time the question of liability to income tax on this stock, and proceeded on several different and inconsistent theories with regard thereto.

The Commissioner of Internal Revenue first took the position that this common stock of the Delaware Company was a stock dividend, and proceeded on that theory and assessed one of the stockholders on the basis that the shares of common stock received by him in the Delaware Company resulted from stock dividend, assessing the same at par, and said stockholder was required to pay the assessment under protest, and he brought suit to recover the amount so paid. That suit is now pending. That after the decision of the Supreme Court of the United States in the case of Towne vs. Eisner, the commissioner abandoned the stock-dividend theory.

That late in the year 1918 or early in 1919 the commissioner proceeded upon the theory that the common stock in the Delaware Company received by the stockholders of the New Jersey Company resulted from a liquidation dividend, and so advised the affiant.

In the letter of J. H. Callan, of the Internal Revenue Bureau, of April 11, 1919, he stated:

"This office holds that the distribution of the stock and securities of E. I. duPont de Nemours & Company was a liquidation dividend. The stockholders of the Powder Company received taxable income to the extent that the fair market value or cost of the stock distributed in each case exceeded the cost to them or the fair market price or value as of March 1, 1913, of their stock in the old corporation in stock to which the distribution was made."

This theory was also conveyed to the stockholders by letter of L. F. Speer, assistant commissioner. This theory was subsequently abandoned.

That about the month of June, 1919, information was received from counsel for the affiant to the effect that the commissioner was considering the distribution of this stock as a property dividend, and contemplated the assessment of the stockholders upon that theory. Whereupon counsel for the affiant interviewed the Commissioner of Internal Revenue and informed him that it was important and desirable that stockholders should know what was the final conclusion of the commissioner, and the commissioner then referred counsel to the advisory board, created under the act of 1918, which provided that—

26 "The commissioner may and on request of any taxpayer directly interested shall submit to the board any question relating to the interpretation or administration of the income, war-profits, or excess-profits tax laws, and the board shall report its findings and recommendations to the commissioner."

That said counsel appeared before the Advisory Board, at Washington, D. C., on June 30, 1919, when the matter was presented by brief and orally.

Nothing was heard from the Tax Advisory Board as to its "findings and recommendations," and on the 28th of October, 1919, said counsel addressed a letter to the Hon. Daniel C. Roper, commissioner, calling his attention to the hearing before the Tax Advisory Board on the preceding June 30, saying:

"I have heard nothing from this hearing, and of course feel exceedingly anxious as it is a matter of very great importance, as the amount suggested as the additional assessment against each stockholder is so large that it would be almost a financial disaster to each of the stockholders to have to raise such a large sum of money to pay out to the Government under protest, with the right to sue for recovery."

and asking whether something could not be done to work out an advantageous basis of settlement.

That no reply was received to this letter and first intimation that the affiant had that the commissioner intended to proceed against him was by a tax bill forwarded January 1, 1920, making a demand for payment of a large sum of money on the basis that the distribution of the common stock of the Delaware Company was a property dividend, and that the fair market value of the stock on October 1, 1915, was $347.50 per share.

27 That this action of the commissioner was more than four years after the transaction, and more than three years and six months after the return of the affiant was made, in which return the commissioner was informed of the circumstances under which the stock was delivered to him.

That the affiant has been informed by the Commissioner of Internal Revenue that the stock has been valued for the purpose of the income tax due by the affiant at $347.50 per share.

That the situation presented to the commissioner and upon which the said value was determined was that the Delaware Company had

issued to the New Jersey Company 588,542 shares of its common stock of the par value of $100 per share, and the New Jersey Company had distibuted this stock to its stockholders, and, therefore, the question was, What was the fair value of this 588,542 shares of common stock so distributed? It was not a question of what 10, 20, 50, 100, or 1,000 shares were worth, but the real question was the value of the entire issue of stock. The question, so far as the affiant was concerned, was the value per share of the 75,000 shares received by him. The commissioner, however, based the finding of the value of the shares entirely upon the private sale of comparatively small lots of stock at Wilmington, the home of the company. The stock was not listed on any exchange, or curb market, and the only sales made were between individuals or brokers, and these sales comprised in the total a small number of shares compared with the total number of shares distributed.

In the case of United States vs. Phellis, in the Court of Claims, in which the plaintiff, for reasons hereinafter set forth, admitted that the value of the stock "was $347.50 a share at the time of its receipt by claimant in October, 1915," the only evidence in support of
28 this admission was the private sale of 183 shares on October 1, 1915, as follows:

Date.	Buyer.	Rate.	Number.
Oct. 1	F. S. Homan	349	10
1	Louise H. Tatnall	353	2
1	Robert E. Cullen	355	5
1	George P. Bissell	353	25
1	Wheatley Matchett	351½	50
1	Tilgh Johnston & Son	353	2
1	Tilgh Johnston & Son	353	15
1	Ernest Smith	355	20
1	Wm. R. Chamberlin	358	4
1	Wm. M. Francis	357	50
	Total		183

The affiant has no way of telling exactly what number of shares of the Delaware Company were sold immediately after this reorganization, but it is a fact that very few shares were sold compared to the total number of shares received by the stockholders.

That the case of Phellis vs. United States was brought in the Court of Claims to recover the amount paid by the claimant under protest on a valuation of his 500 shares at $347.50 per share, and the claimant admitted that the fair value of each share was $347.50, and the evidence in support of this admission is set forth above showing the sale of 183 shares.

That counsel for the affiant, as representing the stockholders who were not parties to the suit, got into correspondence with counsel for the complainant, and insisted that the fair value of the common

stock of the Delaware Company on the 1st of October, 1915,
29 was not equal to its par value, and wrote to counsel for Phellis, under date of February 21, 1921, as follows:

F. S. Bright, Esq.,
Colorado Building, Washington, D. C.

My Dear Mr. Bright: In the assessment of the income tax against the stockholders of the duPont Company, the Government took the value of each share of stock to be $347.50, and this was based upon the fact that some of the stock sold in the market immediately after October 1, 1915, at about that figure.

Of course, everybody knows that no large blocks of the stock could have been sold in the market at any such price. In fact, I think a thousand shares would have broken the market at any time. Small lots could probably have been worked off at that figure.

In the case of Eisner vs. Macomber, 252 U. S. 189, at p. 215, the court speaks of the value of stock as shown by market prices and said:

"But we regard the market prices of the securities as an unsafe criterion in an inquiry such as the present," etc.

In Eisner's Estate, 178 Pa. 143, at p. 147, the court said:

"Market values are no criterion."

The fact is that recently, as I informed, some of this stock has sold down as low as $150.00 per share.

Don't you think it would be very desirable to get into the record in some way the basis upon which the Government made the valuation, to wit, market value alone, so that if the tax should by any possibility be sustained the valuation might be reduced?

30 I have in my possession a balance sheet of the E. I. duPont de Nemours Powder Company of September 30, 1915, the day the transfer took place, and it shows the excess of assets over liabilities, $75,451,883.25.

Capital & surplus—Pref. stk	$16,068,801.34
Com. stk	29,427,282.55
Profit & loss	29,955,799.36
	$75,451,883.25

On the basis of the book value the Powder Company stock could not have been worth more than $200 per share at that time, and the value by the books of the Delaware Company stock could not have been over $100.00 per share. The sale value was a purely speculative one, based upon anticipated profits which were realized, and upon which the stockholders when they were declared in dividends, paid a tax. It therefore seems to me quite an important matter to our clients that in some way we should get this before the Court of Claims, so that that court might review the question of the value of the stock for taxation purposes, if it should hold that the stockholder was taxable under the law.

I merely make this suggestion to you, and I am inclined to think it is worth careful consideration. Perhaps you could get a stipula-

tion with counsel as to the basis upon which the Government made the tax to be put into the record, also a stipulation as to the last market price of the stock.

I now expect to be in Washington on Wednesday and will call to see you.

Very truly,

(Signed) WM. A. GLASGOW, JR.

That again, on February 22, a supplemental letter was written by counsel for the appellant to counsel for Phellis, insisting upon raising the question of the value of the stock, as of October 1st, 1915, as follows:

31

F. S. BRIGHT, ESQ.,
Colorado Building, Washington, D. C.

MY DEAR MR. BRIGHT: Supplementing my letter to you of yesterday upon the question of value of the stock of the Delaware Company when it was received by the stockholders of the Powder Company.

On the 23rd of December, 1914, less than a year before the transfer of the stock (September 30, 1915), Mr. T. Coleman duPont offered to sell to the Powder Company 20,000 shares of the common stock of the company at $160.00 per share. The finance committee met and considered the matter, and passed a resolution on that day "That we do not feel justified in paying more than $125.00 per share for this stock," as the members of the committee said "at that time."

Subsequently, in March, 1915, Mr. T. Coleman duPont sold his entire holdings of preferred and common stock in the Powder Company of New Jersey to the duPont Securities Company. The price for the preferred stock was $85.00 per share and for the common stock $200.00 per share, so that it will be seen that the only sale in 1915 of common stock of the Powder Company in any considerable quantity was at $200.00 per share, and the balance sheet of the company as suggested in my letter yesterday showed that the book value of the common stock of the New Jersey Company on the 30th of September, 1915, was not in excess of $200.00 per share. Undoubtedly, the high value at which the stock sold was a speculative value, based upon expected contracts and profits thereafter to be realized, and I do not think any considerable amount of the stock could have been sold at prices much above $200 per share.

32

These profits were realized and tax thereon paid, as distribution occurred.

Based upon a price of $200 per share, when it is considered that the Powder Company retained in its possession something over 29,000 shares of debenture stock of the Delaware Company, the two shares of the Delaware Company represented in assets exactly what the one share in the Powder Company represented on September 30, 1915. Therefore, the Delaware Company's stock was certainly not worth more than $100.00 per share, based upon book value, and was

worth less than that when the holding of the New Jersey Company in debenture stock is taken into consideration.

It occurs to me that we should protect our clients in this regard by having the facts as to the real book value of their stock in the Delaware Company when received set forth. It will make an enormous difference in taxation to them if on any ground the court should sustain the right of the Government to the tax.

I am suggesting this to you for your consideration, as I expect to have the pleasure of calling on you to-morrow or next day, when we can discuss it.

Very truly,

(Signed) WM. A. GLASGOW, JR.

That under date of February 24 counsel for the affiant received a letter from the general counsel of the company, to whom the matter had been submitted by Mr. Bright and to whom a draft of his brief, which he desired to file as amicus curiæ, had been submitted, as follows:

33 Mr. WM. A. GLASGOW, JR.,
1018 Real Estate Trust Bldg., Philadelphia, Pa.

MY DEAR MR. GLASGOW: I received a copy of your brief amicus curiæ in the Phellis case, which I have read with much interest. Your presentation of the question is, in my opinion, very strong in support of complainant's contention, and accords with my own views in the matter. I have no doubt your brief will be of great benefit to all stockholders similarly interested and of great assistance to the court.

With respect to your tentative suggestion that we make the further contention that in the event the court finds this distribution to be taxable that the book value of the stock be taken as the basis of taxation and not the market value, as the Government contends, I have given consideration to this and I desire to confirm my first impressions that it would not be to our interests as a question of policy to make this claim in this suit. The issue under the record as it now stands is wholly as to the taxability of this stock distribution and not as to the excessiveness of the tax. I do not feel it would be wise to prejudice in any manner, however slight, the issue as to nontaxibility by bringing in the issue as to the excessiveness of the assessment. Furthermore, after consulting with a number of our larger stockholders here, they are inclined to the view that we could not succeed in establishing that the money value of the stock was less than $347.50. While the market value of a stock is an unsafe criterion, the same can be said of the book value of stock in many instances. To illustrate, the market value of du Pont common to-day is nearly 100% less than the book value. Again, many interested stockholders prefer, if they are legally required to pay any tax on this distribution, to pay on the basis of $347.50 and
34 obtain the advantage of having this stock on their books at this rate.

Quite aside from the above, Mr. Bright calls my attention to the fact that if we should make this contention in the present case and succeed that it would preclude us from appealing the Phellis case to the Supreme Court of the United States, this because the jurisdiction of the Supreme Court is confined to cases involving over $5,000. The tax in the Phellis case is $5,625.00.

Very truly yours,

(Signed) J. P. LAFFEY.

After receiving this letter from Mr. J. P. Laffey, declining to permit the question of the value of the stock to be raised in the case, counsel for the affiant filed a brief in the Court of Claims as amicus curiæ, in which he put the following note:

"While some few shares of the New Jersey Company sold for $795 per share and of the Delaware Company sold for $347.50 per share, no considerable part of the stock could have been sold at such figures, and this was the only evidence of valuation for assessment by the Government and was an 'unsafe criterion.' Eisner vs. Macomber, 252 U. S. at p. 215."

And again, when the case was in the Supreme Court, counsel for affiant prepared a brief which was filed for the appellee, which had the following note:

"While some few shares of the New Jersey Company stock sold in the market for $795.00 per share, and the Delaware Company stock for $347.50 per share, no considerable part of this stock could have been sold at such figures, and this was the only evidence of valuation used by the Government in the assessment and was an 'unsafe criterion.' Eisner vs. Macomber, 252 U. S. at p. 215.

35 The book value of the stock was entirely disregarded, and this showed the Delaware Company stock worth not more than par. If the assessment had been based upon par, as was attempted in Towne vs. Eisner, the plaintiff would have been charged with income of only $50,000 instead of being charged with income of $173,750.00 as he is."

That counsel for the affiant has protested at every opportunity that the common stock of the Delaware Company was not worth in excess of par on October 1, 1915, and for the reason the question was not raised and judicially passed upon in the Phellis case, fixing the value of the stock, was that counsel for Phellis objected "as a question of policy" to making the claim as to valuation in that case, and further because—

"Again, many interested stockholders prefer, if they are legally required to pay any tax on this distribution, to pay on the basis of $347.50, and obtain the advantage of having the stock on their books at this rate."

That while it may be to the advantage of some stockholders to have the Government charge them on the basis of $347.50 per share at the 1915 rate and have the stock on their books at that value for the purposes of credit at higher rates of taxation, the affiant, who

has never sold any of his stock but has held it just as it was issued to him, will be mulcted to the point of disaster by an artificial valuation.

That in the case of United States vc. Phellis, in the Supreme Court of the United States, Mr. Justice Pitney, delivering the opinion of the court, said:

"The common stock of the new company after its transfer to the old company and prior to its distribution constituted assets of the old company which it now held to represent its surplus of
36 accumulated profits—still, however, a common fund in which the individual stockholders of the old company had no separate interest. But when this common stock was distributed among the common-stock holders of the old company as a dividend, then at once—unless the two companies must be regarded as substantially identical—the individual stockholders of the old company, including claimant, received assets of exchangeable and actual value severed from their capital interests in the old company proceeding from it as the result of a division of former corporate profits, and drawn by them severally for their individual and separate use and benefit. Such a gain resulting from their ownership of stock in the old company and proceeding from it constituted individual income in the common sense."

That it would therefore seem that the court held that the common stock of the Delaware Company represented the "surplus of accumulated profits" of the New Jersey Company, and that the distribution of this stock among the stockholders resulted in a "division of former corporate profits," and therefore the conclusion would seem to be inevitable that the value of this stock must be measured by the "former corporate profits," and the "surplus of accumulated profits," and this would seem to be the rule which the Supreme Court recognized as showing that the common stock was income or profit, and also the basis upon which its value is to be ascertained.

That the former profits accumulated on September 30, 1915, which are to be taken as the basis of the distribution of this stock was income or profit must be the profits accumulated after the 1st of March, 1913, up to the 1st of October, 1915.

That it will appear from the balance sheet of the New Jersey Company as of March 1, 1913, that the company had accumu-
37 lated profits as of that date of $3,327,893.51. All dividends paid after this date were concurrently earned.

That it is also shown by the balance sheet of the company of September 30, 1915, that the profit and loss account (showing its accumulated profits) was $29,955,799.36, and that on the basis of the accumulated profits up to September 30, 1915, deducting the accumulated surplus profits on March 1, 1913, the stock of the New Jersey Company book value was less than $200 per share, and if when the assets of the New Jersey Company were turned over to the Delaware Company on October 1, 1915, the common stock of the Delaware Company represented "the surplus of accumulated profits"

and the " former corporate profits," the value of the Delaware Company common stock based upon such accumulated profits was less than $50.00 per share.

That the stock issued by the Delaware Company to the New Jersey Company for its assets as an " entirety " and as a " going concern " amounted to $118,515,900.00.

Debenture stock retained by the New Jersey Company	$29,427,100	
Debenture stock used to pay 4½% 30-year bonds of New Jersey Company	14,166,000	
Debenture stock used to retire preferred stock New Jersey Company	16,068,600	
		59,661,700.00
		$58,854,200.00
Common stock Delaware Co. issued to stockholders of New Jersey Company		$58,854,200.00

38 That under the decision of the Supreme Court in the Phellis case the stock of the New Jersey Company held by the stockholders represented capital, and it was further held by that court that this capital or par value of $100 per share was unimpaired because the New Jersey Company retained an equal number of shares of debenture stock of the Delaware Company of the par value of $100. Wherefore, the court held that the common stock of the Delaware Company, amounting to 588,542 shares of the par value of $100 per share, or a total stock issue of $58,854,200, represented, while held by the New Jersey Company, " its surplus of accumulated profits," and after this common stock was distributed to the stockholders of the New Jersey Company it was " severed from the capital interests in the old company proceeding from it as the result of a division of former corporate profits and drawn by them severally for their individual and separate use and benefit." Therefore, in order to determine the value per share of the common stock of the Delaware Company received by the stockholders of the New Jersey Company, it is necessary to ascertain as of October 1, 1915, the " surplus of accumulated profits " and the " former corporate profits " of the New Jersey Company.

That in making the assessment of the common stock of the Delaware Company as of October 1, 1915, the Government did not consider the " surplus of accumulated profits " or the " former corporate profits " of the New Jersey Company, but ascertained at Wilmington, Delaware, what sales had been made privately between brokers or others, of comparatively few shares of stock, and having been informed that the stock had sold privately at $347.50 or higher (in small lots) the Government assessed the value of the stock on that evidence alone at $347.50.

That the question was not the value of comparatively small blocks of the stock but the value of 586,542 shares. Because A may have sold 10, 20, or 50 shares of the stock privately, under certain circumstances, at $347.50 is no evidence that the 75,000 shares of the affiant could have been sold at any such figure, and the Government entirely disregarded the view of the Supreme Court as to the stock representing the "surplus of accumulated profits" and the "former corporate profits."

That from the year 1904 the New Jersey Company had in effect by proper corporate action a bonus or profit-sharing plan, which provided for the distribution among its employees who might contribute to the general good of the company, and whom it was desired to have interested as stockholders therein, a part of the earnings of the company. This distribution, however, while ascertained and awarded to the employee in terms of dollars, based upon a percentage of surplus earnings of the company, was paid to the employee in the capital stock of the company at the value at which it was purchased by the company. For example, if the officers of the company awarded to an employee $1,000, they paid this in shares of stock of the company at the price at which it was purchased, and if the shares cost the company $250.00 per share the employee received four shares. The stock, however, was not immediately delivered to the employee, but if he remained with the company for five years, at the end of that time the stock was delivered to him full paid and nonassessable.

The stock for bonus distribution was purchased by the company monthly, and during the period prior to the 1st of October, 1915, a large amount of the stock of the New Jersey Company had been purchased by the officers of the company for the bonus distribution. These purchases were made by the officers of the company at high prices and it was to the interest of the officers to bid the stock to a high price. After October 1st, these high prices of New Jersey Company stock were reflected in the price of Delaware Company stock. Immediately after the 1st of October, 1915, a large amount of stock in the total was purchased from day to day in small-share lots for this bonus distribution at high prices. Between the 1st of October, 1915, and the 1st of January, 1916, the company purchased for bonus purposes 4,586 shares of the common stock of the Delaware Company, and between the 1st of October, 1915, and the 1st of April, 1917, about a year and six months, the company purchased for bonus purposes 29,006 shares of its common stock at the average price of $305.83 per share, and 16,640 shares of its debenture stock at the average price of $105.65 per share.

It cost the company nothing more to pay a high price for its own stock than to pay a low price therefor. It had so many dollars—being a certain percentage of its profits—to invest in its own stock for bonus distribution, and it was a matter of no financial concern to the company, its stockholders, or officers, what price they paid for the stock.

This purchase by the officers of the company of small lots offered, with unlimited authority as to the price, furnished the backbone of the demand for the stock, and without this purchase by the company from month to month any substantial amount of the stock put upon the market would have had no purchaser as a whole, and if it had been attempted to sell the stock in small lots, a large block of, say, 10,000 shares would undoubtedly have broken the market down to par.

The officers of the company who were managing the bonus plan—the purchase of the stock and its distribution—were deeply interested in maintaining this stock at a high price. This is shown by the fact that these officers of the company, constituting practically a majority of the board of directors through the duPont Securities Company had borrowed in New York from J. P. Morgan & Company ten million of dollars, for which a large part of their common stock, if not all, in the Delaware Company was put up as collateral, and it was of the greatest importance to the officers of the company who were controlling the purchase of the stock of the company for bonus purposes to see that this stock was kept up at an
41 apparently high price, thereby strengthening their collateral in New York for the large loan aforesaid.

The only evidence of actual sales showing the price and number of shares sold must be secured if at all from the books of brokers who were privately dealing in this stock. There were no public sales: the stock was not listed on any exchange, and the question of sale, was one of private negotiation between individuals.

The only evidence of sales—the price and the number of shares—is contained in Exhibit No. 11 in the Phellis case, showing the sale in small lots of a total of 183 shares.

Therefore, if the true guide in this case as to value should be the sales made of the stock—and this the affiant denies under the opinion of the Supreme Court in the Phellis case—yet the evidence of sales, the number of shares sold, and the circumstances surrounding the sales are such that the sales price of the stock furnishes no proper criterion as to the real value thereof.

On the 24th of January, 1920, affiant was informed in a letter from the Acting Assistant to the Commissioner of Internal Revenue that the commissioner claimed that he was liable for the additional tax in the sum of $1,576,015.86, and demanding payment thereof.

Affiant charges that no return has been made for him by the commissioner in accordance with the terms of the act of October 3, 1913. The notice and demand dated December 31, 1919, aforesaid, was made upon him charging that he had received on the 1st of October, 1915, 75,534 shares of the common stock of the Delaware Company in accordance with the circumstances above set forth, and further, that said stock on that day was of the fair value of $347.50 per share, and that therefore affiant had received $26,248,065 of personal in-
42 come in the year 1915 in addition to the income shown upon the return filed by affiant as aforesaid. Affiant claims that the

commissioner had no power in law to make the notice and demand upon affiant for the payment of the additional tax aforesaid, and that the commissioner acted without warrant of law for the following reason, to wit:

1. The commissioner at no time made a return upon information for affiant as to additional income received by him in the year 1915.

2. That under the act of October 3, 1913, and the law, no assessment for additional income tax could be made by the Commissioner of Internal Revenue until he had made "a return upon information" for affiant.

3. That the notice and demand dated December 31, 1919, was made upon affiant more than three years after the commissioner was informed and discovered that affiant had received the 75,534 shares of the common stock of the Delaware Company as aforesaid.

4. That said notice and demand dated December 31, 1919, was made more than three years after the 1st of March, 1916, at which date affiant's return of income accruing to him for the year 1915 was "due" and actually filed by affiant.

Therefore, affiant claims that in making the demand upon him for the sum of $1,576,015.86 as additional income tax for the year 1915, the Commissioner of Internal Revenue acted unlawfully, illegally, and without warrant of law.

Affiant was further informed by the letter dated January 24, 1920, from the Acting Assistant to the Commissioner of Internal Revenue that the commissioner renewed his demand for the payment of the $1,576,015.86 by affiant as additional income tax, and informed affiant that unless he paid the same, collection would be made
43 thereof by the collector for the district of Delaware "through distraint"; and thereupon affiant filed a claim in abatement of said tax, which said claim was duly referred to the Commissioner of Internal Revenue and has been overruled by him.

That on November 23, 1921, Congress passed an act known as "the revenue act of 1921." By said act, section 250-d, it is provided as to demands for taxes made under that act "for prior taxable years or under any prior income excess-profits or war-profits tax acts" or under section 38 of the act approved August 5, 1909, that—

"No suit or proceeding for the collection of any such taxes due under this act or under any prior income excess-profits or war-profits tax acts or of any taxes due under section 38 of such act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this act."

No "suit or proceeding" has been "begun" against affiant for the collection of any additional income tax for the year 1915, and he has not consented in writing or otherwise to any "determination, assessment, and collection" of any additional income tax upon him for the year 1915. Affiant therefore claims that any claim of additional income tax for the year 1915 is under the provision of the

act aforesaid of November 23, 1921, barred after five years from the 1st day of March, 1916, the day upon which his return for 1915 was filed, and that no "suit or proceeding" can be begun against him for the collection thereof after the 1st day of March, 1921.

Affiant further shows that by section 1320 of the act known as "the revenue act of 1921," approved November 23, 1921, it is provided:

44 "That no suit or proceeding for the collection of any internal revenue tax shall be begun after the expiration of five years from the time such tax was due except in the case of fraud with intent to evade tax or willful attempt in any manner to defeat or evade tax. This section shall not apply to suits or proceedings for the collection of taxes under section 250 of this act, nor to suits or proceedings begun at the time of the passage of this act."

Affiant further claims that any tax for which he was liable on account of net income accruing to him for the year 1915 was due and payable "on or before the 1st day of June," 1916, and that he has not been guilty of "fraud with intent to evade tax" nor has he been guilty of "willful attempt in any manner to defeat or evade tax"; and that no "suits or proceedings" were "begun" against him for the collection of any additional income tax for the year 1915 at the time of the passage of "the revenue act of 1921," approved November 23, 1921; and, therefore, he claims that any "suit or proceeding" by the Commissioner of Internal Revenue or the collector of internal revenue for the district of Delaware against him for additional income tax for the year 1915 is forever barred by the provisions aforesaid of the act of 1921.

That the collector of internal revenue for the district of Delaware intends to proceed by distraint or otherwise to collect from affiant the $1,576,015.86, referred to in the notice and demand of December 31, 1919, and that the said collector will proceed to collect the same by distress and sale of affiant's lands and freehold in the district of Delaware, and that said demand on the part of the Commissioner of Internal Revenue constitutes a cloud upon the lands and freehold of affiant situate in Brandywine Hundred, New Castle County, Delaware; and that if the commissioner proceeds to collect said demand by distress and sale of affiant's lands and freehold that the loss of his said freehold by means of a tax sale would be irreparable damage to affiant. That by reason of the long delay on the
45 part of the Commissioner of Internal Revenue, the 75,534 shares of common stock of the Delaware Company received by affiant on October 1, 1915, and now held by affiant are not salable, that no market can at present be found for said stock, and that affiant will be unable by the use of said stock to secure the money to prevent the sale of his freehold estate upon such distraint.

That the act of 1921 and the sections above quoted forever bar the collector of internal revenue from proceeding by distraint to collect the $1,576,015.86, or any part thereof, claimed by said Commissioner of Internal Revenue, but if the said collector should collect said tax

by unlawful distraint upon affiant's property in violation of his duty, and in violation of the act of November 23, 1921, aforesaid, affiant's right to recover in a suit at law the said amount unlawfully collected and distrained as aforesaid by the said collector is so doubtful that affiant would be irreperably injured and damaged by permitting the distraint upon his property as aforesaid.

Section 3225 of Revised Statutes, as amended by the "revenue act of 1921," is as follows:

"When a second assessment is made in case of any list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded or paid back or recovered by any suit unless it is proved that such list, statement, or return was not wilfully false or fraudulent, and did not contain any wilful understatement or undervaluation."

That this same amendment of section 3225 was in the "revenue law of 1918."

That, therefore, if by distraint upon affiant's property the collector should collect the additional tax claimed by him for the year
46 1915, by sale of affiant's property, or if affiant should pay the same under duress and under protest, affiant would be deprived of the right given him by the act of November 23, 1921, and he would be barred from recovering the money collected by the collector, as aforesaid, in case it should be held that the return made by affiant on March 1, 1916, was "wilfully" incorrect and in that sense "wilfully" false, and would further be deprived of the right given him by the act of November 23, 1921, if it should be held that affiant's return was wilfully incorrect and that it contained wilful understatement of income, in that the Supreme Court in the case of United States vs. Phellis has held that the common stock received by the affiant on October 1, 1915, was taxable under the act of October 3, 1913, and, therefore, under this decision of the Supreme Court affiant's return made on March 1, 1916, was incorrect in not including said common stock.

That the act of November 23, 1921, gives to the affiant the right to hold his property free of any suit or proceeding by the said collector by levy upon and sale of the same for income tax claimed against affiant for the year 1915, and if the collector can proceed by distraint to collect the same affiant is irreparably deprived of the forum in which to assert his right under the said act of 1921, or to recover the tax collected by the collector in violation of the act of November 23, 1921.

That the 75,534 shares of common stock of the Delaware Company received by him on the 1st day of October, 1915, was not of a fair value in excess of $50.00 per share, and yet the collector of internal revenue has charged affiant with the value therof as of October 1, 1915, at $347.50 per share.

That the return required of affiant by the act of October 3, 1913, of net income accruing to him in the year 1915 was due on March 1, 1916, and affiant on that day made his return as required by law.

47 That by section 3226 of the Revised Statutes as amended by section 1318 of the "revenue act of 1921," it is provided that—

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or for credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, or the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim, unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."

That by section 252 of the revenue act of 1918 it is provided—

"That if upon examination of any return of income made pursuant to * * * the act of October 3, 1913, * * * it appears that an amount of income * * * tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income * * * taxes or installments thereof then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer. Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

48 That the above section 252 of the act of 1918 was reenacted as section 252 of the "revenue act of 1921."

That if the collector of internal revenue for the district of Delaware is now permitted to collect the $1,576,015.86 as and for additional income tax against affiant for the year 1915, that affiant by the delay of the Commissioner of Internal Revenue in assessing and collecting such tax, the amount whereof is in excess of that properly due, is not permitted under the provisions of law above set forth to file with the commissioner a claim for refund of the excess amount of said tax properly due, in that more than five years since the date "when the return was due" by affiant on March 1, 1916, have elapsed; and by the delay of the commissioner affiant will be deprived of any remedy for the collection and return of the excess taxes collected from affiant for the year 1915.

That while the law gives affiant a right of action to recover taxes erroneously or illegally assessed or collected provided he proceeds

within the proper time by claim for refund thereof, yet the revenue act of 1921 does not give to the affiant a right of action to recover taxes which are collected by distraint or otherwise by the collector of internal revenue in violation of the limitations provided by the revenue act of 1921; and if the collector of internal revenue for the district of Delaware should proceed in violation of the revenue act of 1921, and collect the income tax for the year 1915 against affiant by the sale of his property or otherwise, it is very doubtful whether affiant would have a right of action against the collector to recover the amount so collected, on the ground that the collector has proceeded in violation of the limitations contained in the "revenue act of 1921."

That while section 3224 of the Revised Statutes of the United States provides that—

49 "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,"

that the provision of this section must be read in the light of the subsequent act of Congress of November 23, 1921, which forever bars the Commissioner of Internal Revenue from "the assessment or collection of any tax" against affiant for income received by him in the year 1915, and Congress has modified to this extent section 3224 of the Revised Statutes, and affiant is entitled to the full benefit of his right given by that act, and to prevent in a court of equity the distraint upon his property by the collector of internal revenue for the district of Delaware for the collection of the tax against him for the year 1915.

By the act of Congress of November 23, 1921, it was provided that "no suit or proceeding shall be begun" to collect the claim of the Commissioner of Internal Revenue against affiant for additional income tax for the year 1915, and this is a right given to affiant to hold his property free from distraint by the collector for the collection of said claim.

That affiant is now threatened immediately with such distraint, and he has no other remedy to enforce his said right except in this court of equity, and without the aid of this court on the bill filed by affiant, he will be forever deprived of the right given him by the act of Congress aforesaid and immediate and irreparable loss and damage will result to the affiant before the matter can be heard on notice.

Wherefore affiant requests that this court issue its temporary injunction enjoining and restraining the defendant above named, his agents, servants, employees, and subordinates, and each and every of them from in any manner enforcing or collecting or attempting to enforce or collect or causing to be enforced or collected against

50 the plaintiff, the tax or any part thereof claimed by the Commissioner of Internal Revenue against the income received by the affiant during the year 1915, until the further order of this court or the final determination of this suit.

That no previous application for this temporary injunction has been made.

(Signed) ALFRED I. DUPONT.

Sworn to and subscribed before me this 30th day of January, 1922.

[SEAL.] (Sgd.) EDITH W. SMELTZER,
Notary Public.

My commission expires March 7, 1925.

In United States District Court.

Motion for preliminary injunction.

(Filed January 31, 1922.)

And now, to wit, this 31st day of January, A. D. 1922, the complainant in the above cause, by Wm. A. Glasgow, jr., Henry P. Brown, and Robert Penington, esquires, his solicitors, moves the court that a preliminary injunction issue out of this court and be served upon the said defendant, as prayed in the bill of complaint filed in said cause.

(Sgd.) WM. A. GLASGOW, JR.,
(Sgd.) HENRY P. BROWN,
(Sgd.) ROBERT PENINGTON,
Solicitors for Complainant.

In United States District Court.

Order setting motion down for hearing.

(Filed January 31, 1922.)

And now, to wit, this 31st day of January, A. D. 1922, the bill of complaint filed in this cause having been read and considered
51 by the court, together with the motion this day filed in said cause by the complainant, through his solicitors, for a preliminary injunction as prayed in said bill of complaint:

It is ordered by the court that said motion for a preliminary injunction be heard in this court in Wilmington, in said district, on Tuesday, the 14th day of February, A. D. 1922, at 10 o'clock in the forenoon:

And the complainant in this cause having filed in this court with his bill, the affidavit and exhibits in support of said motion, it is ordered:

That the defendant, after being served with a copy of this order, and the bill, exhibits, and affidavits aforesaid, file in this court, on or before the 8th day of February, A. D. 1922, all affidavits and exhibits in opposition to said motion:

And further, that the complainant file in this court on or before the 11th day of February, A. D. 1922, all affidavits and exhibits in reply to such new matter as may be set forth in any affidavit or exhibit filed as aforesaid by said defendant;

And it is further ordered by the court, that notice of said motion, with this order, be forthwith given to the defendant, and to that end the United States marshal for this district do forthwith serve upon the defendant a copy of said motion and this order, together with a copy of the bill of complaint filed in this cause.

(Sgd.) J. W. THOMPSON, J.

In United States District Court.

Motion to dismiss.

(Filed February 14, 1922.)

And now comes Harry T. Graham, defendant in the above cause, by James H. Hughes, jr., U. S. attorney for the district of Delaware, his attorney, and moves the court to dismiss the bill of com-
52 plaint filed herein for the reasons and upon the grounds that, as appears upon the face thereof:

1. This court has no jurisdiction to hear and determine this suit, such jurisdiction being specifically denied it by section 3224 of the Revised Statutes of the United States.

2. The plaintiff has a plain, speedy, and adequate remedy at law.

3. This court has no jurisdiction of the subject matter of the suit.

4. The said complaint is wholly without equity.

5. The plaintiff is not entitled to the relief prayed for by this complaint against the defendant, nor to any relief arising from the facts alleged in said complaint.

6. The said bill of complaint is argumentative and states mere legal conclusions, particularly in paragraphs numbered twelve, thirteen, fourteen, seventeen, eighteen, and twenty-one.

7. There is a misjoiner of parties in said bill in this—

That Harry T. Graham, individually, is without power and means to collect the taxes complained of and has no interest, individually, in the subject matter of the suit.

8. The bill of complaint is not verified according to law.

Wherefore, and for divers other good reasons of objection, the defendant prays the judgment of this honorable court whether he shall be compelled to make further or any answer to the said complaint and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Sgd.) JAMES H. HUGHES, JR.,
U. S. Atty. Dist. of Del.

53 In United States District Court.

Affidavit of defendant, Harry T. Graham.

(Filed February 14, 1922.)

Harry T. Graham, being duly sworn according to law, deposes and says that he is collector of United States internal revenue for the district of Delaware, and the defendant in this cause of action.

That on February 19, 1916, Alfred I. duPont, hereinafter referred to as the complainant, filed a return of income tax on Form 1040 (revised) for income received by him as an individual during the year ended December 31, 1915 (Exhibit 1); that said income tax return contained no report of the receipt by the complainant during the year 1915 of 75,534 shares or any other number of shares of the common stock of E. I. du Pont de Nemours & Co. of Delaware, hereinafter called the Delaware Corporation, and no enclosure, exhibit, or statement setting forth any of the details or circumstances showing the receipt by him as dividends, income, or otherwise, of 75,534 or other number of shares of common stock of the Delaware Corporation, nor has complainant ever filed with affiant any such return, statement, or exhibit showing the receipt by him of any such shares of common stock.

Affiant is informed and believes that on February 24, 1916, complainant addressed a letter (Exhibit 2) to the collector of internal revenue at Baltimore, Maryland, in which he stated that he had, through error, overstated the amount of his net income and that the same should be reduced in the amount of $137,925.60, and that the amount of tax shown on said return as due and payable should be reduced in the amount of $8,275.54, and requesting that said return be returned to him with a new blank in order that he might correct said errors; that on February 25, 1916, the collector at Baltimore informed complainant by letter (Exhibit 3) that he was hold-
54 ing complainant's original income tax return in order that complainant might submit an amended return. On March 4, 1916, complainant filed with the collector at Baltimore an amended return of income received during the year ended December 31, 1915, on Form 1040 (revised) (Exhibit 4), which said income tax return, as amended, contained no report of the receipt by the defendant of 75,534 shares or any other number of shares of the common stock of the Delaware Corporation, and no enclosure, exhibit, or statement setting forth any of the details or circumstances showing the receipt by him as dividends, income, or otherwise, of 75,534 or other number of shares of common stock of the Delaware Corporation, nor has complainant ever filed any such return or statement or exhibit showing the receipt by him of any such shares of common stock.

Affiant is informed and believes, from an examination of the records of the Bureau of Internal Revenue, that on November 27, 1917, Income Tax Inspector D. P. du Ross made a report to the revenue agent in charge at Baltimore (Exhibit 5) showing the result of an

investigation made by him of the complainant's tax liability for the years 1913, 1914, and 1915, and in said report said inspector reported among other things that the complainant had received as income during the year 1915 "200% common stock dividends issued by E. I. du Pont de Nemours Co. previously omitted," and that as a result of such investigation and other investigations the Commissioner of Internal Revenue, in the regular routine of office procedure, prepared a return upon information as provided for by sec. 2E of the income tax act of Oct. 3, 1913 (Exhibit 6); and that said return of Income Tax Inspector du Ross contained the first information to the Commissioner of Internal Revenue that complainant had received during the year 1915, as dividends, said shares of common stock of the Delaware Corporation. Affiant is informed and believes that on January 22, 1918, Mr. William A. Glasgow, jr., as attorney for the complainant "and several others" addressed a letter
55 (Exhibit 7) to L. F. Speer, Deputy Commissioner of Internal Revenue, Washington, D. C., in tenor as follows:

"Referring to the question of income tax on the issue of securities of the E. I. duPont de Nemours & Company in 1915, which has been the subject of investigation, and about which I have heretofore written you.

"I represent Mr. Alfred I. duPont, a stockholder at Wilmington, Delaware, and several others, and before any attempt is made to assess any stockholder, I think it very important that the commissioner should give us a hearing, especially in view of the case of Towne v. Eisner, decided by the Supreme Court of the United States on January 7th, and the principles of which I contend govern under the facts of the matter. I therefore earnestly ask that before anything is done, a hearing should be had.

"Suggestion was made to me as to preparing a brief of the facts. Representing Mr. Alfred I. duPont, I have no free access to the books of the duPont Company, and I have been trying to get the information upon which to prepare this accurate statement of facts. I have been unable to do so up to the present time, but will hope to do this in the near future."

That in response to the foregoing request the Commissioner of Internal Revenue granted a hearing to be held at 10.30 a. m., Tuesday, April 2, 1918, in the Treasury Building at Washington, D. C.

Affiant is further informed and believes that on March 26, 1918, Mr. Glasgow wrote a letter (Exhibit 8) to L. F. Speer, Deputy Commissioner of Internal Revenue, requesting a postponement of the hearing on the income tax liability of Alfred I. duPont until May 15, 1918; and that the Deputy Commissioner of Internal
56 Revenue replied on April 1, 1918 (Exhibit 9) informing Mr. Glasgow that the question of Mr. duPont's tax liability was still under investigation, and that when the investigation was completed and before final action he would be notified and granted a hearing if necessary; that on April 24, 1918, Mr. Glasgow again wrote to Deputy Commissioner Speer (Exhibit 10) as follows:

"Referring to the above matter, about which I saw you yesterday, Tuesday, morning: I understand the situation to be now, in view of your letter to me of April 1, as confirmed in our conversation, that the 'question of Mr. duPont's liability is still under investigation, and when the investigation is completed and before final action has been taken' that you will notify me, and 'if a hearing is found necessary' my request for a hearing will be granted.

"If you could put me in touch with the proper man in your organization to consider this question, I think I have in my possession all of the documentary material which it would be necessary for him to have; and as I am so firm in my conclusion that the matter is entirely governed by the case of Towne v. Eisner, I think I could convince the proper representative of your bureau."

Affiant is informed and believes that on September 6, 1918, the Bureau of Internal Revenue addressed a letter to the complainant (Exhibit 11), requesting that in order to complete the audit of his income tax return for 1915 complainant file a statement in reply to the following questions:

"1. The number of shares owned by you and the fair market value per share of the E. I. duPont de Nemours Powder Company stock as of March 1, 1913.

"2. Did you purchase any of such stock after March 1, 1913, and what did it cost per share?

57 "3. The fair market value of the E. I. duPont de Nemours and Company stock (the new company) at time said stock was received in exchange for the stock of the old company.

"4. The exact date you received your shares of stock in the new company and the manner in which you determined the fair market value of same.

"5. The number of shares of stock owned by you in the Powder Company at time of distribution of the new company's stock, and the number of shares of new stock received in exchange for the old."

And that complainant made no reply to said request for information. Affiant is informed and believes that on July 22, 1919, Internal Revenue Agents Joseph N. Benners and D. P. du Ross submitted to the internal revenue agent in charge at Baltimore a report (Exhibit 12) of a reinvestigation of the income tax liability of complainant for the year 1915, in which it was reported that the complainant had during the year 1915 received from E. I. duPont de Nemours Powder Company of New Jersey 75,534 shares of common stock of the Delaware Corporation in the form of a dividend distribution, said shares of stock having a fair market valuation of $347.50 per share on the date of the distribution, i. e., October 1, 1915.

On or about December 13, 1919, affiant received from the Commissioner of Internal Revenue a letter dated December 12, 1919 (Exhibit 13), in tenor as follows:

"Reference is made to your report dated November 30, 1917, and supplemental reports dated April 19, 1918, and July 30, 1919, covering an investigation by examining officers Joseph N. Benners and

D. P. du Ross of the income tax liability of the above named individual for 1913 to 1917, inclusive, which as audited in this
58 office indicates further taxes for 1913, 1915, 1916, and 1917, and an overpayment for 1914.

"The further tax for 1913, $2,584.19, has been assessed.

"In accordance with section 252, revenue act of 1918, the overpayment of $978.61 for 1914 has been applied against the further tax for 1915, $1,576,994.47, and the balance, $1,576,015.86, together with the further tax for 1916, $442.00, and for 1917, $1,235.71, a total of $1,577,693.57 will be assessed on the next list furnished the collector of internal revenue for the District of Delaware.

"The audit in this office discloses an overpayment for 1914 of $978.61, due to allowing credit for the tax paid at source in excess of the correct normal tax liability.

"The difference in the tax due for 1915 as shown by your supplemental report dated July 30, 1919, and that stated above, is due to treating as income the dividend of 75,534 shares of stock of E. I. duPont de Nemours and Company, received by the taxpayer by reason of his ownership of 37,767 shares of the stock of the E. I. duPont de Nemours Powder Company. The value of this stock as of date of receipt was $347.50 per share as determined from facts submitted to this office.

"Previous office holdings in the case are superseded by the above, which is based on a more complete statement of facts than was available when the earlier conclusions were reached.

"The item of taxes paid within the year as shown by the examining officers' report is reduced $978.61, due to the overpayment of tax for 1914 of a like amount.

59 "These adjustments result in increasing the further tax as recommended by the examining officers from $1,361,500.35 to $1,576,994.47.

"The excess of the wife's dividends over the normal taxable income for 1917, $4,458.71, has been applied against the husband's net income before computing the normal tax, which results in a further tax of $1,235.71 instead of $1,414.05, as recommend by the examining officer.

"The taxpayer should be advised of the result of the office audit.

"A copy of this letter will be furnished the collector of internal revenue for the district of Delaware."

On or about December, 1919, affiant received from the Commissioner of Internal Revenue, Washington, D. C., an assessment list containing an assessment against the complainant for additional income taxes for the year 1915 in the sum of $1,576,015.86, and for the years 1915, 1916, and 1917 the total sum of $1,577,693.57, with the direction that demand be made upon the complainant for said amount. In accordance with the directions of the Commissioner of Internal Revenue, affiant on December 31, 1919, made demand upon the complainant for the payment of the additional income taxes assessed as aforesaid. That complainant never paid said assess-

ment in response to said demand, but on January 1, 1920, replied to affiant by letter (Exhibit 14), saying that the demand was improper and illegal; and that on January 4, 1920, the Bureau of Internal Revenue addressed a letter to the complainant informing him, among other things, that the assessment was legal and proper and that therefore "the demand notice dated January 10, 1920, is returned with the suggestion that you pay the tax as thereon indicated, thereby avoiding the collection of same by the collector of your district through distraint."

60 Affiant is informed and believes that on February 2, 1920, a hearing (transcript attached marked "Exhibit 15") was granted to Mr. William A. Glasgow, jr., as attorney for complainant and others, by the Commissioner of Internal Revenue at Washington, D. C. At said hearing counsel for complainant requested, among other things, that he be permitted to postpone the filing of a claim for abatement of the additional tax assessed against him until a decision had been reached by the courts of Pennsylvania in the case of Philip F. duPont. He was informed that under the provisions of the law there was no authority granted for the postponement of a claim for abatement and was advised to either pay the tax in accordance with the demand notice sent by the collector or immediately file his claim for abatement thereof as provided by law. On March 8, 1920, complainant filed with the affiant a claim for abatement of the additional income tax for the year 1915, assessed as aforesaid in the sum of $1,576,015.86, which said claim for abatement was rejected by the Commissioner of Internal Revenue February 3, 1922 (Exhibit 16). Affiant further states that he has not, since his demands of December 31, 1919, and January 10, 1920, made any effort to collect the above-mentioned assessment of additional income taxes for the year 1915, against the complainant by distraint against the complainant's property, or otherwise.

Affiant is informed by an examination of the records of the Bureau of Internal Revenue, and therefore believes, that on February 16, 1920, certain stockholders of the duPont Powder Company of New Jersey, by their attorney, directed a letter (Exhibit 17) to the Commissioner of Internal Revenue, requesting that a test case be agreed upon to determine the taxability of the dividends received by such stockholders on October 1, 1915, in the common stock of the Delaware corporation; that for the purposes of the case one of the claims for abatement filed by one of said stockholders be rejected; that a claim for refund be filed by such stockholder and disposed of promptly by rejection in order that a suit might be filed im-

61 mediately in the Court of Claims in order to get a speedy judicial determination of the case; and further requesting the cooperation of the bureau to expedite the disposition of the case, first in the Court of Claims and then in the Supreme Court, and stating "that if this course can be pursued and the claimants for abatement are permitted to await the decision of the Supreme Court they will abide by that decision, whatever it may be, and pay what-

ever tax is due by them, following the decision of the court, without its being necessary to sue or other legal steps being taken to collect the taxes."

Affiant is further informed from an examination of the records of the bureau, and believes, that the Commissioner of Internal Revenue, desiring to make no distinction between the stockholders of said duPont Powder Company of New Jersey, in agreeing to defer action until after the decision of the Supreme Court in a test case, directed that action should be withheld in all cases pending the determination of the question by decision of the Supreme Court as to the taxability of the dividends distributed as aforesaid.

Affiant is informed, and believes, that the case of Charles W. Phellis, a stockholder of the duPont Powder Company of New Jersey, who received 500 shares of the common stock of the Delaware Corporation upon the distribution thereof by the New Jersey Company on October 1, 1915, was selected as a test case by counsel for certain of the stockholders of the New Jersey Company, and that it was understood and agreed between such stockholders and the Commissioner of Internal Revenue that action on the claim of stockholders for abatement of the taxes as assessed against them on account of said distribution of stock would be withheld pending decision by the Supreme Court of the United States of the question of whether said stock so distributed constituted taxable income to the distributees. The case having come on for hearing before the Court of Claims, the court upon the evidence found as a fact, inter alia, that—

62 "The fair market value of the stock of the New Jersey corporation on the 30th day of September, 1915, was $795 per share, and the fair market value of the stock of said New Jersey corporation, after the execution of the contracts between two corporations, was, on October 1, 1915, $100. The fair market value of the stock of the Delaware Corporation, distributed as aforesaid, was, on October 1, 1915, $347.50 per share." (Copy of decision Ct. Cl. dated March 14, 1921, attached, marked "Exhibit 18.")

The court decided as a matter of law that the dividends so distributed were not taxable income and that the plaintiff was entitled to recover. This decision was reviewed by the Supreme Court of the United States on appeal, and on December 21, 1921, the Supreme Court handed down its decision (copy attached, marked "Exhibit 19"), reversing the judgment of the Court of Claims as to its conclusion of law and holding that on the facts as found by the Court of Claims the dividends distributed by the New Jersey Corporation in the common stock of the Delaware Corporation were taxable income to the plaintiff. That Mr. Glasgow, as attorney for the complainant herein and other stockholders, intervened in said case in the Court of Claims and in the Supreme Court, filed briefs, and participated in the oral argument.

Affiant is further informed, and believes, that since the decision of the Supreme Court, aforesaid, the plaintiff in this suit, and other

stockholders represented by Mr. Glasgow, made application to the Commissioner of Internal Revenue for a revision of the fair market value per share of the common stock of the Delaware Corporation as of October 1, 1915, claiming that the value of $347.50 per share found by the Bureau of Internal Revenue and the Court of Claims was too high; that in response to such appeal the commissioner submitted the question as to the fair market value of the stock on October 1, 1915, to the Committee on Appeals and
63 Review of the Bureau of Internal Revenue, which committee, after examining further evidence and hearing interested parties, submitted its opinion to the commissioner that the fair market value of the common stock of the Delaware Corporation on October 1, 1915, was $347.50 per share, as found by the Court of Claims in the case of Charles W. Phellis v. United States.

(Sgd) HARRY T. GRAHAM.

Sworn to and subscribed before me this 14th day of February, 1922.

[SEAL.] H. C. MAHAFFY, JR.,

Notary Public in and for New Castle County.

UNITED STATES OF AMERICA.
TREASURY DEPARTMENT, *February 11, 1922.*

Pursuant to section 882 of the Revised Statutes—

I hereby certify that the annexed are true copies of the original annual net income, the amended return, and the return for information for the year 1915, filed by Alfred I. duPont, Wilmington, Delaware; claim for abatement of $1,576,015.86; record of taxpayers conference dated February 2, 1920; letter of February 24, 1916, from Alfred I. duPont to Internal Revenue Collector Miles; copy of letter of February 25, 1916, from acting assistant to the commissioner, to internal revenue agent in charge, Baltimore; letter of January 1, 1920, from Alfred I. duPont to Internal Revenue Collector Graham; letter of January 24, 1920, from acting assistant to the commissioner, Newton, to Alfred I. duPont; letter of February 16, 1920 from F. S. Bright to commissioner; copy of letter of March 5, 1920, from the commissioner to F. S. Bright; letter of March 8, 1920 from
64 Collector Graham to the commissioner; inter-office memo of March 10, 1920, from G. V. N. (G. V. Newton, deputy commissioner) to Mr. Morman (head claims division); a copy of letter of April 21, 1920, from Deputy Commissioner Newton to Mr. William A. Glasgow, jr.; copy of letter (undated) from commissioner to Mr. Alfred I. duPont, on file in this department.

In witness whereof I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

Thesaur.*Amer.* Septent. * Sigil.

By direction of the Secretary.

ELMER DOVER,
Assistant Secretary of the Treasury.

EXHIBIT 1 TO AFFIDAVIT.

To be filled in by collector.

Assessment List 23-B .....
(Month.)
Folio..... *Line*.....

Above space to be stamped by collector, showing district and date received.

Form 1040 (Revised).

INCOME TAX.

THE PENALTY.

For failure to have this return in the hands of the collector of Internal Revenue on or before March 1 is $20 to $1,000.

(See Instructions on page 4.)

UNITED STATES INTERNAL REVENUE.

To be filled in by Internal Revenue Bureau.

File No.....

Examined by.....

Audited by.....

IMPORTANT.

Read this form through carefully. Fill in pages 2 and 3 before making entries on first page.

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS.

(As provided by act of Congress approved October 3, 1913.)

INCOME RECEIVED OR ACCRUED DURING THE YEAR ENDED DECEMBER 31, 1915.

Filed by (or for) Alfred I. duPont, of Wilmington, Delaware.

COMPLETE ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a return of income for the preceding year? Yes. If so, in what Internal Revenue District was it filed? Present.
Were you *single or married* with wife or husband living with you on December 31 of the year for which this return is rendered? Yes. If married, give full name of wife or husband. Alicia duPont.
Has your wife or husband income from sources independent of your own? Yes.
Have you included your wife's or husband's income in this return? No.

	Millions.	Thou.	Hundreds.	Cents.
1. Gross income (brought from line 28)	$ 3	4 0 5	2 9 0	41
2. General deductions (brought from line 36)	$	1 1	9 5 7	10
3. Net income	$ 3	3 9 3	3 3 3	31

Specific deductions and exemptions allowed in computing normal tax of 1 per cent.

	Millions	Thou.	Hundreds	Cents
4. Dividends (brought from line 27)	$ 3	3 5 2	2 1 4	99
5. Income on which the normal tax has been paid or is to be paid at the source (brought from line 23, Column A)	$	1 4	0 0 0	00
6. Specific exemption of $3,000 or $1,000, as the case may be	$		0 0 0	00
NOTE.—If separate return is made by husband or wife and exemption is prorated, state amount claimed by: Husband $4,000.00 / Wife $				
7. Total deductions and exemptions (Items 4, 5, and 6)				3 3 6 7 2 1 4 99
8. Taxable income on which the normal tax of 1 per cent is to be calculated				2 6 1 1 8 32

NOTE.—When the net income shown above on line 3 exceeds $20,000, the additional tax thereon must be calculated as per schedule below.

	INCOME. Millions	Thou.	Hundreds	Cents	TAX. Millions	Thou.	Hundreds	Cents
One per cent on amount over $20,000 and not exceeding $50,000	$	5 0	0 0	00	$		3 0	00
Two per cent on amount over $50,000 and not exceeding $75,000	$	2 5	0 0	00	$		5 0	00
Three per cent on amount over $75,000 and not exceeding $100,000	$	2 5	0 0	00	$		7 5	00
Four per cent on amount over $100,000 and not exceeding $250,000	$ 1	5 0	0 0	00	$		6 0	00
Five per cent on amount over $250,000 and not exceeding $500,000	$ 2	5 0	0 0	00	$	1 2	5 0	00
Six per cent on amount over $500,000	$ 2 8	9 3	3 3	31	$	1 7	3 6	00
9. Total additional or super tax					$	1 9	3 6	5 0 00
10. Total normal tax (1 per cent of amount entered on line 8)					$		2 6	1 18
11. Total tax to be paid					$	1 9	3 9	1 1 18

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS—Continued.

GROSS INCOME.

This statement must show in the proper spaces the ENTIRE AMOUNT of gains, profits, and income received by or accrued to the individual from all sources during the year specified on page 1, EXCEPT income derived from the obligations of the United States or any of its possessions, or of any State or political subdivision thereof, including district drainage bonds, and amounts paid by a State or any political subdivision thereof for services rendered as an officer or employee.

DESCRIPTION OF INCOME. NOTE.—If husband and wife render separate returns, only the income and deductions of the husband or wife (as the case may be) who renders *this return* shall be included herein; but if separate returns are not rendered by both husband and wife the income and deductions of both husband and wife shall be included separately as provided on this form.	A. Income on which the tax has been paid or is to be paid at the source.												B. Income on which the tax has NOT been paid or is not to be paid at the source.											
	Millions.			Thou.		Hundreds.			Cents.				Millions.			Thou.		Hundreds.			Cents.			
Total amount derived from—																								
12. Salaries and wages	$				1	1	0	0	0	00			$				4	0	0	0	00			
Wife's income																								
13. Professions and vocations																								
Wife's income																								
14. Business, trade, commerce, or sales, or dealings in property, whether real or personal																								
Wife's income	$												$						1	7	80			
15. Rents																								
Wife's income																								
16. *Interest* on notes, mortgages, bank deposits, and securities other than reported on lines 17 and 20																	9	4	4	4	77			
Wife's income																								
17. *Interest* on bonds, mortgages, or deeds of trust, or other similar obligations of domestic corporations, joint stock companies or associations, and insurance companies																2	8	6	1	2	85			
Wife's income																								
18. Fiduciaries[8] (excepting dividends from domestic corporations, which must be included as indicated in line 26 below)																								
Wife's income																								
19. Partnership gains and profits, whether distributed or not. (*Net* gains or profits must be reported here)																								
Wife's income																								
20. Interest upon bonds issued in foreign countries and upon *foreign mortgages* or like obligations (not payable in the United States), and also dividends upon the stock or interest upon the obligations of foreign corporations, associations, and insurance companies engaged in business in foreign countries																								
Wife's income																								

21. Royalties from mines, oil wells, patents, franchises, or other legalized privileges																					
Wife's income																					
22. Other sources not enumerated above																					
Wife's income																					
NOTE.—State here sources from which income entered on line 22 is received and amount received from each.																					
23. Totals (NOTE.—Enter total of column A on line 5)	$				1	1	0	0	0	00	$				4	2	0	7	5	42
24. Aggregate totals of columns A and B											$				5	3	0	7	5	42
25. Dividends on stock or from the net earnings of domestic corporations, joint stock companies, associations, or insurance companies subject to like tax	$		3	3	5	2	2	1	4	99										
26. Dividends received through fiduciaries (see line 18)																				
27. Total dividends (to be entered on line 4)	$		3	3	5	2	2	1	4	99	$		3	3	5	2	2	1	4	99
28. Total gross income (to be entered on line 1)											$		3	4	0	5	2	9	0	41

* There should be included under this item all income received from guardians, trustees, executors, administrators, agents, receivers, conservators, or other persons acting in a fiduciary capacity.

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RETURN OF ANNUAL NET INCOME OF INDIVIDUALS—Continued.

GENERAL DEDUCTIONS.

NOTE.—Claims for deductions can not be allowed unless the information required below is clearly set forth.

	Millions.	Thou.	Hundreds.	Cents.
29. The amount of necessary expenses actually paid within the calendar year, for which the return is made, in carrying on any *individual business*. There *must not* be included under this head personal, living, or family expenses, business expenses of partnerships, or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions.	$			
Wife's deduction				
NOTE.—State on the following lines the principal businesses in which the above expenses were incurred.				
30. All interest paid within the year on personal indebtedness of taxpayer		9	9 0	56
Wife's deduction				
31. All national, State, county, school, and municipal taxes paid within the year (not including those assessed against local benefits)		2	0 5	54
Wife's deduction				
32. Losses actually sustained during the year incurred in trade or arising from fires, storms, or shipwreck, and not compensated by insurance or otherwise				
Wife's deduction				
NOTE.—State (*a*) of what the loss consisted, (*b*) when it was actually sustained, and (*c*) how it was determined to be a loss.				
33. Debts past due which have been actually ascertained to be worthless and which have been charged off within the year				
Wife's deduction				
NOTE.—State (*a*) of what the debts consisted, (*b*) when they were created, (*c*) when they became due, and (*d*) how they were actually determined to be worthless.				
34. Amount representing a reasonable allowance for the *exhaustion, wear, and tear of property arising out of its use or employment in business*. No deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return				
Wife's deduction				
NOTE.—State (*a*) what the property was on which depreciation is taken (if buildings, state when erected, of what material constructed, and value of same, as of January 1, of the calendar year for which this return is rendered), and (*b*) what percentage of depreciation is claimed.				
35. Amount allowed to cover depletion in case of mines and oil wells, not to exceed 5 per cent of the gross value at the mine or well of the output for the calendar year for which this return is rendered				
Wife's deduction				
NOTE.—State (*a*) cost of mine or well, (*b*) gross value at the mine or well of the output for the calendar year for which this return is rendered, and (*c*) what percentage of depletion is claimed.				
36. Total "General Deductions" (to be entered on line 2)	$	1 1	9 5 7	10

NOTE.—If space is insufficient for answering any questions, attach a supplemental sheet to this return.

c2—7357

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING HIS OWN RETURN.

I swear (or affirm) that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all taxable gains, profits, and income received by or accrued to me during the year for which the return is made, and that I am entitled to all the deductions and exemptions entered or claimed therein under the Federal income tax law of October 3, 1913.

Sworn to and subscribed before me this eighteenth day of February, 1916. ALFRED I. DUPONT.
[SEAL.]

THEODORE W. FRANCIS,
Notary Public.

AFFIDAVIT TO BE EXECUTED BY DULY AUTHORIZED AGENT MAKING RETURN FOR INDIVIDUAL.

I swear (or affirm) that I have sufficient knowledge of the affairs and property of ..... to enable me to make a full and complete return of the taxable income thereof, and that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all the taxable gains, profits, and income received by or accrued to said individual during the year for which the return is made, and that the said individual is entitled under the Federal income tax law of October 3, 1913, to all the deductions and exemptions entered or claimed therein, and that I am authorized to make this return for the following reasons:

.....
.....
.....

.....
(Signature of agent.)

Sworn to and subscribed before me this.....day of....., 191—. .....
[SEAL.] (Post-office address of agent.)

.....
.....
(Official capacity.)

INSTRUCTIONS.

1. This return shall be made by every citizen of the United States, whether residing at home or abroad, and by every person residing in the United States, though not a citizen thereof, having a *net income* of $3,000, or over, for the taxable year.

2. This return shall be made by every *nonresident alien* deriving any net income from property owned and business, trade, or profession carried on in the United States by him. No specific exemption is allowed nonresident aliens.

3. When an individual by reason of minority, sickness, or other disability, or absence from the United States, is unable to make his own return, it may be made for him by his *duly authorized* representative.

4. This return should be filed with the collector of internal revenue for the district in which the individual resides. In case the person resides in a foreign country, then with the collector for the district in which his principal business is carried on in the United States.

5. When the return is not filed within the required time by reason of sickness or absence of the individual, an extension of time, not exceeding 30 days from March 1, within which to file such return *may be* granted by the collector, *provided* a written application therefor is made by the individual within the period for which such extension is desired.

6. This return, properly filled out, must be made under oath or affirmation. Affidavits may be made before any officer *authorized by law* to administer oaths.

7. An unmarried individual or married individual not living with husband or wife shall be allowed an exemption of $3,000. When husband and wife live together, they shall be allowed jointly a total exemption of only $4,000 on their aggregate income. Either husband or wife may make, sign, and verify a return of their joint income. Where husband and wife have separate incomes, they make a joint return of such separate income, both subscribing to the return, or they may make separate returns of their respective incomes, but in no case shall they claim or be allowed more than $4,000 exemption on their aggregate incomes.

8. Amounts charged on line 29 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 34, must not exceed the deterioration of the property in one year.

69 EXHIBIT 2 TO AFFIDAVIT.

FEBRUARY 24, 1916.

MR. JOSHUA W. MILES,
Internal Revenue Collector,
Baltimore, Md.

DEAR SIR: I find on going over my income tax return that I made an error in the valuation of a dividend declared by the duPont Company last June of 5%, payable in Atlas Powder Company's preferred stock. In estimating the value of this, I took the value of the common stock at that time, instead of the preferred. The net result of this error is that the valuation which I placed on this stock was $319,207.20, when it should have been $181,281.60, or a difference of $137,925.60, which should not have been declared. This would show a net reduction in the amount of tax which I have to pay in amount of $8,275.54.

If you will return my declaration to me with a new blank, I will make it out correctly, or if you prefer to credit me on account of this error, it will be perfectly satisfactory to me.

As a matter of fact, it is not clear to me that this dividend declared in Atlas Powder Company's preferred stock should be treated as ordinary income, as it was not a declaration of profits by the duPont Company but one of assets, and therefore reduced the value of my holdings in the duPont Company just that much. In other words, if the duPont Company were to liquidate and distribute all its assets among its stockholders, this surely would not be treated as income. This Atlas stock was distributed for the reason that these values originally appeared as bonds of the Atlas Company and were afterwards taken up and exchanged by the Atlas Company for preferred stock. Inasmuch as under the decree of dissolution the duPont Company was prohibited from holding stock in this company, it became necessary to distribute it, and therefore the distribution was one of capital values and not a distribution of earnings. My under-
70 standing of the principle of the income tax is that this distribution of capital value should not have been declared as income, which I have done.

Yours truly,

ALFRED I. DUPONT.

TO BE FILLED IN BY COLLECTOR.

Assessment List 23-B ..... MAR 1916
(Month.)

Folio 3[illegible] REVENUE

INTERNAL REVENUE RECEIVED MAR 1916 ST OF MD.

Space to be stamped by Collector, with district and date received.

Form 1040 (Revised).

INCOME TAX.

THE PENALTY

FOR FAILURE TO HAVE THIS RETURN IN THE HANDS OF THE COLLECTOR OF INTERNAL REVENUE ON OR BEFORE MARCH 1 IS $20 TO $1,000.

(SEE INSTRUCTIONS ON PAGE 4.)

TO BE FILLED IN BY INTERNAL REVENUE BUREAU.

File No. 14

Audited by .....

IMPORTANT.
Read this form through carefully.
Fill in pages 2 and 3 before making entries on first page.

UNITED STATES INTERNAL REVENUE.

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS.

(As provided by Act of Congress, approved October 3, 1913.)

INCOME RECEIVED DURING THE YEAR ENDED DECEMBER 31, 191 1915

Filed by ..... Alfred I. du Pont, of .....
(Street and number.)
..... Wilmington, Del.
(Post-office address.) (State.)

ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a re[illegible] the preceding year? Yes. If so, in what Internal Revenue District was it filed? .....

Were you *single* or *marr*[illegible] husband living with you on December 31, of the year for which this return is rendered? .....

If married, give full name[illegible] ..... Alice Dalton

Has your wife or husband in[illegible] independent of your own? ..... Yes

Have you included your wife's [illegible]e in this return? ..... No

	Millions	Thousands	Hundreds	Cents
1. Gross Income (brought from line [illegible]				
2. General Deductions (brought from [illegible]				
3. Net Income	$			

TRANSCRIPT MADE 1/10/17

Specific deductions and exemptions a[illegible]d in computing normal tax of 1 per cent.

Millions	Thousands	Hundreds	Cents
1	61	11	

4. Dividends (brought from line 27) .... $

5. Income on which the normal tax has been paid or is to be paid at the source (brought from line 23, Column A) .... $

6. Specific exemption of $3,000, or $4,000, as the case may be .... $

NOTE.—If separate return is made by husband or wife and exemption is prorated, state amount claimed by: Husband .... $ Wife ....

7. Total deductions and exemptions (Items 4, 5, and 6) ....

8. TAXABLE INCOME on which the normal tax of 1 per cent is to be calculated ....

NOTE.—When the net income shown above on line 3 exceeds $20,000 the additional tax thereon must be calculated as per schedule below.

Claim for abatement of $1,576,031.86 rejected 11/16/22

	INCOME.				TAX.			
	Millions	Thousands	Hundreds	Cents	Millions	Thousands	Hundreds	Cents
One per cent on amount over $20,000 and not exceeding $50,000	$				$			
Two per cent on amount over $50,000 and not exceeding $75,000	$				$			
Three per cent on amount over $75,000 and not exceeding $100,000	$				$			
Four per cent on amount over $100,000 and not exceeding $250,000	$				$			
Five per cent on amount over $250,000 and not exceeding $500,000	$				$			
Six per cent on amount over $500,000	$				$			

9. Total additional or super tax .... $

10. Total normal tax (1 per cent of amount entered on line 8) .... $

11. Total tax to be paid .... $

2—7357

EXHIBIT 3 TO AFFIDAVIT.

FEBRUARY 25, 1916.

MR. ALFRED I. DUPONT, *Wilmington, Del.*

SIR: I have your favor of February 24, 1916, and am holding your original return in order that you may submit an amended return in proper form.

Please mark your return "Amended," and let us have it as soon as convenient.

Respectfully,

Collector.

BRY

GROSS INCOME.

This statement must show in the proper spaces the ENTIRE AMOUNT of gains, profits, and income received by the individual *from* all dources during the year specified on page 1, EXCEPT income derived *from* the obligations of the United States or any of its possessions, or of any State or political subdivision thereof, including district drainage bonds, and amounts paid by a State or any political subdivision thereof for services rendered as an officer or employee.

DESCRIPTION OF INCOME. NOTE.—If husband and wife render separate returns, only the income and deductions of the husband or wife (as the case may be) who renders *this return* shall be included herein: but if separate returns are not rendered by both husband and wife the income and deductions of both husband and wife shall be included separately as provided on this form.	A. Income on which the tax has been paid or is to be paid at the source.									B. Income on which the tax has NOT been paid or is not to be paid at the source.									
Total amount derived from—	Millions.		Thou.		Hundreds.			Cents.		Millions.		Thou.		Hundreds.			Cents.		
12. Salaries and wages	$			1	1	0	0	0	00	$			4	0	0	0	00		
Wife's income																			
13. Professions and vocations																			
Wife's income																			
14. Business, trade, commerce, or sales, or dealings in property, whether real or personal																			
Wife's income																			
15. Rents															1	7	80		
Wife's income																			
16. *Interest* on notes, mortgages, bank deposits, and securities other than reported on lines 17 and 20													9	4	4	4	77		
Wife's income																			
17. *Interest* on bonds, mortgages or deeds of trust, or other similar obligations of domestic corporations, joint-stock companies or associations, and insurance companies													2	8	6	1	2	85	
Wife's income																			
18. Fiduciaries * (excepting dividends from domestic corporations, which must be included as indicated in line 26 below)																			
Wife's income																			
19. Partnership gains and profits, whether distributed or not. (*Net* gains or profits must be reported here)																			
Wife's income																			
20. Interest upon bonds issued in foreign countries and upon *foreign mortgages* or like obligations (not payable in the United States), and also dividends upon the stock or interest upon the obligations of foreign corporations, associations, and insurance companies engaged in business in foreign countries																			
Wife's income																			
21. Royalties *from* mines, oil wells, patents, franchises, or other legalized privileges																			
Wife's income																			
22. Other sources not enumerated above																			
Wife's income																			
NOTE.—State here sources from which income entered on line 22 is received and amount received *from* each.																			
23. Totals (NOTE.—Enter total of column A on line 5)	$			1	1	0	0	0	00	$			4	2	0	7	5	42	

24.	Aggregate totals of columns A and B																					
25.	Dividends on stock or from the net earnings of domestic corporations, joint-stock companies, associations, or insurance companies subject to like tax	$		3	2	1	4	2	8	9	39	$				5	3	0	7	5	42
26.	Dividends received through fiduciaries (see line 18)																				
	Wife's income																				
27.	Total dividends (to be entered on line 4)											$		3	2	1	4	2	8	9	39
28.	Total gross income (to be entered on line 1)											$		3	2	6	7	3	6	4	81

* There should be included under this item all income received from guardians, trustees, executors, administrators, agents, receivers, conservators, or other persons acting in a fiduciary capacity.

GENERAL DEDUCTIONS.

NOTE.—Claims for deductions can not be allowed unless the information required below is clearly set forth.

	Millions	Thou.	Hundreds	Cents
29. The amount of necessary expenses actually paid within the calendar year, for which the return is made, in carrying on any *individual business*. There *must not* be included under this head personal, living, or family expenses, business expenses of partnerships, or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions				
Wife's deduction	$			
NOTE.—State on the following lines the principal businesses in which the above expenses were incurred.				
30. All interest paid within the year on personal indebtedness of taxpayer		9	9 0 5	36
Wife's deduction				
31. All national, State, county, school, and municipal taxes paid within the year (not including those assessed against local benefits)		2	0 5 1	54
Wife's deduction				
32. Losses actually sustained during the year incurred in trade or arising from fires, storms, or shipwreck, and not compensated by insurance or otherwise				
Wife's deduction				
NOTE.—State (*a*) of what the loss consisted, (*b*) when it was actually sustained, and (*c*) how it was determined to be a loss.				
33. Debts past due which have been actually ascertained to be worthless and which have been charged off within the year				
Wife's deduction				
NOTE.—State (*a*) of what the debts consisted, (*b*) when they were created, (*c*) when they became due, and (*d*) how they were actually determined to be worthless.				
34. Amount representing a reasonable allowance for the *exhaustion, wear, and tear of property arising out of its use or employment in business*. No deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return				
Wife's deduction				
NOTE.—State (*a*) what the property was on which depreciation is taken (if buildings, state when erected, of what material constructed, and value of same, as of January 1, of the calendar year for which this return is rendered), and (*b*) what percentage of depreciation is claimed.				
35. Amount allowed to cover depletion, in case of mines and oil wells, not to exceed 5 per cent of the gross value at the mine or well of the output for the calendar year for which this return is rendered				
Wife's deduction				
NOTE.—State (*a*) cost of mine or well, (*b*) gross value at the mine or well of the output for the calendar year for which this return is rendered, and (*c*) what percentage of depletion is claimed.				
36. Total "General Deductions" (to be entered on line 2)	$	1 1	9 5 7	10

NOTE.—If space is insufficient for answering any questions, attach a supplemental sheet to this return.

c2—7857

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING HIS OWN RETURN. c2—7357

I swear (or affirm) that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all taxable gains, profits, and income received by me during the year for which the return is made, and that I am entitled to all the deductions and exemptions entered or claimed therein under the Federal income tax law of October 3, 1913.

Sworn to and subscribed before me this 2d day of March, 1916.
[SEAL.]

ALFRED I. DUPONT.

THEODORE W. FRANCIS,
Notary Public.

AFFIDAVIT TO BE EXECUTED BY DULY AUTHORIZED AGENT MAKING RETURN FOR INDIVIDUAL.

I swear (or affirm) that I have sufficient knowledge of the affairs and property of.....to enable me to make a full and complete return of the taxable income thereof, and that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all the taxable gains, profits, and income received by said individual during the year for which the return is made, and that the said individual is entitled under the Federal income tax law of October 3, 1913, to all the deductions and exemptions entered or claimed therein, and that I am authorized to make this return for the following reasons:

.....

.....

.....

.....
(Signature of agent.)

.....
(Post-office address of agent.)

Sworn to and subscribed before me this.....day of....., 191—.
[SEAL.]

.....

.....
(Official capacity.)

INSTRUCTIONS.

1. This return shall be made by every citizen of the United States, whether residing at home or abroad, and by every person residing in the United States, though not a citizen thereof, having a *net income* of $3,000, or over, for the taxable year.

2. This return shall be made by every *nonresident alien* deriving any net income from property owned and business, trade, or profession carried on in the United States by him. No specific exemption is allowed nonresident aliens.

3. When an individual by reason of minority, sickness, or other disability, or absence from the United States, is unable to make his own return, it may be made for him by his *duly authorized* representative.

4. This return should be filed with the collector of internal revenue for the district in which the individual resides. In case the person resides in a foreign country, then with the collector for the district in which his principal business is carried on in the United States.

5. When the return is not filed within the required time by reason of sickness or absence of the individual, an extension of time, not exceeding 30 days from March 1, within which to file such return *may be* granted by the collector, *provided* a written application therefor is made by the individual within the period for which such extension is desired.

6. This return, properly filled out, must be made under oath or affirmation. Affidavits may be made before any officer *authorized by law* to administer oaths.

7. An unmarried individual or married individual not living with husband or wife shall be allowed an exemption of $3,000. When husband and wife live together they shall be allowed jointly a total exemption of only $4,000 on their aggregate income. Either husband or wife may make, sign, and verify a return of their joint income. Where husband and wife have separate incomes they make a joint return of such separate income, both subscribing to the return, or they may make separate returns of their respective incomes, but in no case shall they claim or be allowed more than $4,000 exemption on their aggregate incomes.

8. Amounts charged on line 29 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 34, must not exceed the deterioration of the property in one year.

76 EXHIBIT 5 TO AFFIDAVIT.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Baltimore, Md., November 30, 1917.

IT—Alfred I. duPont.
1913—1916.

Hon. D. C. ROPER,
Commissioner Internal Revenue, Washington, D. C.

SIR: Under date of the 27th instant Income Tax Inspector D. P. DuRoss reported as follows:

I have the honor to report on verification of attached transcripts 1913, 1914, and 1915 personal returns of Alfred I. duPont, Wilmington, Del., Dist. Md., also for the year 1916, to which latter year I extended investigation in the absence of transcript of return.

Additional tax disclosed.

1913	$2,584.19
1914	None.
1915	$455,246.07
1916	442.00
Total	$458,272.26

77 The respondent was vice president of the E. I. duPont de Nemours Powder Co., during the years 1913, 1914, and 1915, during which he received a salary of $15,000.00 per annum.

1913—Supplemental revision.

GROSS INCOME.

Salaries	(B)	$12,591.67
Interest		6,277.97
Interest on bonds	(A)	7,380.00
Interest " "	(B)	11,810.00
Dividends		$331,432.00
Total gross income		$369,491.64

DEDUCTIONS.

Interest	$11,371.54	
Taxes	1,306.25	
Bad debts	4,166.67	
		16,844.46
Net income		$352,647.18
Dividends	$331,432.00	
At source	7,380.00	
Exemption	3,333.33	
		342,145.33
Income subject to normal tax		$10,501.85
Normal tax 1%		105.02
Income subject 1% super tax	$30,000.00	300.00
" " 2% " "	25,000.00	500.00
" " 3% " "	25,000.00	750.00
" " 4% " "	150,000.00	6,000.00
" " 5% " "	102,647.18	5,132.36
Total tax liability		$12,787.38

Amount paid per original return	$7,325.94	
" assessed per original return	2,877.25	
Total amount of tax paid		$10,203.19
Additional tax per supplemental amended return		$2,584.19

78 Salaries, $12,500.00, reported in col. A, should have been reported in col. B, as the tax was not withheld at the source.

Interest on notes and deposits amounted to $6,277.97 for the taxable period instead of $5,231.64 as originally reported. (Increase $1,046.33.)

Interest on bonds, $5,925.00, reported in col. B, is in error, and should be $7,380.00, col. A, and $11,810.00, col. B, tax on the former amount having been withheld at the source. In preparation of the original return interest on bond was confused with dividends from stocks. (Increase $13,265.00.)

Dividends shown in original return in error. Amount received during taxable period amounted to $331,432.00 instead of $287,427.92 as originally reported. (Increase $44,004.08.)

Deductions general:

Interest, $11,371.54, correct. Representing five-sixths of the total paid within the year.

Taxes, $1,306.25, correct. Representing 5-6 of the total paid within the year.

Losses, $54,100.00, originally reported, represents loans of which $5,000.00 only was actually ascertained to be worthless during the year. The remaining amount, $49,100.00, represents loans to the Virginia Graphite Co. This company mergered with the Tonkin duPont Company of Wilberforce, Canada, in December, 1913. The latter company assumed the obligations of the former company, and was still in existence on December 31st: therefore, the amount $49,100.00 is disallowed. The $5,000.00 loan was to a lawyer in New York City, who died during the year 1913, leaving no property or assets. Of this amount 5-6, or $4,166.67, is apparently a proper deduction. (Decrease $49,933.33.)

79

Increase in gross income	$58,315.41		
Decrease in general deductions	49,933.33		
Additional net income	$108,248.74		
Subject to 4% super tax	5,601.56	or	$224.06
Additional amt. subject to super tax at 5%	102,647.18	or	5,132.36
Additional income subject to 1% normal tax	10,501.85	or	105.02
Total additional tax			$5,461.44
Amount previously assessed per amended ret			2,877.25
Additional tax due			$2,584.19

Duly executed amended return for taxable year 1913 is herewith enclosed.

1914.

Salaries	col. (A)	$14,850.00
Should be	col. (B)	15,000.00
The difference represents 1% tax withheld		150.00

Salary received during the year from E. I duPont de Nemours Co., Wilmington, Del., the normal tax being withheld at the source on the whole amount.

The other items of income found correct as reported.

Deductions:

Interest, $12,818.07, correct.

Taxes in error, amount of income tax paid omitted, $7,325.94.

Losses, $5,500.00, represent losses sustained during the year from fire, consisting of live stock and not compensated by insurance.

	Bad debts reported	$125,000.00
80	Includes loss on securities not allowable	45,000.00
	Amount actually ascertained to be worthless	80,000.00
	Amount disallowed in 1913 ascertained to be worthless in 1914	49,100.00
	(No additional tax)	$129,100.00

1915 (revised).

Salaries	(A)	11,000.00
Salaries	(B)	4,000.00
Rents		17.80
Interest		9,444.77
Interest bonds	(B)	$28,612.85
Totals A and B		$53,075.42
Dividends		$10,815,242.79
Total gross income		$10,868,318.21

GENERAL DEDUCTIONS.

Interest	$9,905.56	
Taxes	13,639.32	
		23,544.88
Net income		$10,844,773.33
Dividends	$10,815,242.79	
Source	11,000.00	
Exemption	4,000.00	
		10,830,242.79
Amount subject to normal tax		14,530.54
Normal tax 1%		145.31
1% super tax	$30,000.00	300.00
2% super tax	25,000.00	500.00
Amount carried forward		$945.31
81 Amount brought forward		$945.31
3% super tax	$25,000.00	750.00
4% super tax	150,000.00	6,000.00
5% super tax	250,000.00	12,500.00
6% super tax	$10,344,773.33	$620,686.40
Total tax liability		$640,881.71
" " previously paid		185,635.64
Additional tax		$455,246.07

Salaries, $11,000.00 and $4,000.00, col. A and B, respectively, received from the E. I. duPont de Nemours Co., Wilmington, Delaware. Amount in (A) represents amount in excess of exemption claimed.

Interest on bonds, $28,612.85, correct, and properly belongs in col. (B) exemption having been claimed at source on the whole amount.

DIVIDENDS.

Cash dividends reported			$3,033,007.79
5% pfd. stock dividends reported			181,281.60
Total dividends reported			$3,214,289.39
Cash dividends revised	$3,073,007.79		
Cash dividends reported	3,033,007.79		(increase).
Cash dividends previously omitted in error			$40,000.00
5% pfd. stock dividends revised at valuation placed upon it by the corporation	$188,835.00		
Reported at estimated market value	181,281.60		
Increase			$7,553.40
82 200% common stock dividend issued by E. I. duPont de Nemours Co., previously omitted			$7,553,400.00
Total increase in gross income			$7,600,953.40

DEDUCTIONS.

Interest correct		$9,905.56
Taxes originally reported		2,051.54
Taxes previously omitted:		
Income tax paid	$11,477.78	
Income tax at source	110.00	
		11,587.78
Taxes revised		$13,639.32
(Increase $11,587.78.)		
Increase gross income		$7,600,953.40
Increase in deductions		11,587.78
Additional net income		$7,589,365.62
Additional super tax		$455,361.94
Decrease in normal tax		115.87
Total additional tax		$455,246.07

1916 (revised).

GROSS INCOME.

Salaries	(B)	$478.55
Rents		600.82
Interest		$33,442.84
Interest bonds	(A)	32,553.00
Interest bonds	(B)	79,837.93
Dividends		$8,361,752.39
Dividends, fiduciary		6,030.00
Total gross income		$8,514,695.53

DEDUCTIONS.

Interest	$600.00	
Taxes	$190,943.97	
		$191,543.97
		$8,323,151.56

83	Dividends	$8,367,782.39	
	Exemption	4,000.00	$8,371,782.39
Income subject to normal tax			(None.)
Income subject to super tax 1%		$20,000.00	$200.00
Income subject to super tax 2%		20,000.00	400.00
Income subject to super tax 3%		20,000.00	600.00
Income subject to super tax 4%		20,000.00	800.00
Income subject to super tax 5%		50,000.00	2,500.00
Income subject to suepr tax 6%		50,000.00	3,000.00
Income subject to super tax 7%		50,000.00	3,500.00
Income subject to super tax 8%		50,000.00	4,000.00
Income subject to super tax 9%		200,000.00	18,000.00
Income subject to super tax 10%		500,000.00	50,000.00
Income subject to super tax 11%		500,000.00	55,000.00
Income subject to super tax 12%		500,000.00	60,000.00
Income subject to super tax 13%		6,323,151.56	$822,009.70
Total tax liability			$1,020,009.70
Total tax paid			$1,019,567.70
Additional tax			$ 442.00

Salaries, $35.00, reported (A), should have been reported (B), tax not having been withheld at source.

84 Items of income found correct.

Dividend reported from fiduciaries was received from the estate of B. G. duPont, Security Trust and Safe Deposit Co., Wilmington, Del., Trustees.

Taxes reported correct, represents income tax	$185,635.64
Additional income tax year 1913	2,877.25
Property tax	2,431.08
Total	$190,943.97

Losses reported $3,400.00 represents losses on securities and being in excess of gains from these sources is therefore disallowed.

Decreases in deductions	$3,400.00
Subject to 13% super tax	$3,400.00

I therefore recommend that Alfred I. duPont, Wilmington, Del., Dist. Md., be assessed as follows under the acts of October 3, 1913, and September 8, 1916:

Income tax for the year 1913	$2,584.19
" " " " " 1915	$455,246.07
" " " " " 1916	442.00
Total	$458,272.26

Transcripts for 1913, 1914, and 1915 together with amended return for 1913 are enclosed.

Copy of this report has been sent to Collector Miles.

Respectfully,

E. A. FORBES.
Internal Revenue Agent.

JMW/H.
Enclosures.

Exhibit 6 to Affidavit.

To be filled in by collector.

Assessment List 28-B .....

Folio ..... *Line* ..... (Month)

Above space to be stamped by collector showing district and date received.

Form 1040 (Revised).

INCOME TAX.

THE PENALTY.

For failure to have this return in the hands of the collector of internal revenue on or before March 1 is $20 to $1,000.

(See Instructions on page 4.)

UNITED STATES INTERNAL REVENUE.

To be filled in by Internal Revenue Bureau.

File No. .....

Audited by .....

IMPORTANT.

Read this form through carefully.
Fill in pages 2 and 3 before making entries on first page.

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS.

(As provided by act of Congress, approved October 3, 1913.

INCOME RECEIVED DURING THE YEAR ENDED DECEMBER 31, 1915.

Filed by (or for) Alfred I. duPont, of Wilmington, Del.

COMPLETE ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a return of income for the preceding year? ..... If so, in what Internal Revenue District was it filed? .....

Were you *single or married* with wife or husband living with you on December 31, of the year for which this return is rendered? .....

If married, give full name of wife or husband. .....

Has your wife or husband income from sources independent of your own? .....

Have you included your wife's or husband's income in this return? .....

	Millions.			Thou.			Hundreds.			Cents.
1. Gross income (brought from line 28)	$ 2	2		7	6	4	9	2	3	21
2. General deductions (brought from line 36)	$				2	3	5	4	4	88
3. Net income	$ 2	2		7	4	1	3	7	8	33

EXHIBIT 6 TO AFFIDAVIT—Continued.

Specific deductions and exemptions allowed in computing normal tax of 1 per cent.

	Millions.	Thou.	Hundreds.	Cents.
4. Dividends (brought from line 27)	$ 3	2 6 1	8 4 2	79
5. Income on which the normal tax has been paid or is to be paid at the source (brought from line 23, column A)	$	1 1	0 0 0	00
6. Specific exemption of $3,000, or $4,000 as the case may be	$	4	0 0 0	00
NOTE.—If separate return is made by husband or wife and exemption is prorated, state amount claimed by: Husband $ ..... Wife $				
7. Total deductions and exemptions (Items 4, 5, and 6)		3	2 7 6 8 4 2	79
8. Taxable income on which the normal tax of 1 per cent is to be calculated		1	9 4 6 4 5 3 5	54

NOTE.—When the net income shown above on line 3 exceeds $20 000 the additional tax thereon must be calculated as per schedule below.

	INCOME. Millions.	Thou.	Hundreds.	Cents.	TAX. Millions.	Thou.	Hundreds.	Cents.
One per cent on amount over $20,000 and not exceeding $50,000	$	3 0	0 0 0	00	$		3 0 0	00
Two per cent on amount over $50,000 and not exceeding $75,000	$	2 5	0 0 0	00	$		5 0 0	00
Three per cent on amount over $75,000 and not exceeding $100,000	$	2 5	0 0 0	00	$		7 5 0	00
Four per cent on amount over $100,000 and not exceeding $250,000	$	1 5 0	0 0 0	00	$	6	0 0 0	00
Five per cent on amount over $250,000 and not exceeding $500,000	$	2 5 0	0 0 0	00	$	1 2	5 0 0	00
Six per cent on amount over $500,000	$ 1 8	9 6 4	5 3 5	54	$	1 3 3 4	4 8 2	70
9. Total additional or super tax					$	1 3 5	4 5 3 2	70
10. Total normal tax (1 per cent of amount entered on line 8)					$	1 9 4	6 4 5	36
11. Total tax to be paid					$	1 5 4	9 1 7 8	06

GROSS INCOME.

This statement must show in the proper spaces the ENTIRE AMOUNT of gains, profits, and income received by the individual from all sources during the year specified on page 1, EXCEPT income derived from the obligations of the United States or any of its possessions, or of any State or political subdivision thereof, including district drainage bonds; and amounts paid by a State or any political subdivision thereof for services rendered as an officer or employee.

DESCRIPTION OF INCOME. NOTE.—If husband and wife render separate returns, only the income and deductions of the husband or wife (as the case may be) who renders *this return* shall be included herein; but if separate returns are not rendered by both husband and wife the income and deductions of both husband and wife shall be included separately as provided on this form.	A. Income on which the tax has been paid or is to be paid at the source.				B. Income on which the tax has NOT been paid or is not to be paid at the source.			
	Millions.	Thou.	Hundreds.	Cents.	Millions.	Thou.	Hundreds.	Cents.
Total amount derived from—								
12. Salaries and wages	$	1 1	0 0 0	00	$	4	0 0 0	00
Wife's income								
13. Professions and vocations								
Wife's income								
14. Business, trade, commerce, or sales, or dealings in property, whether real or personal								
Wife's income								
15. Rents								
Wife's income								
16. *Interest* on notes, mortgages, bank deposits, and securities other than reported on lines 17 and 20							1 7	80
Wife's income								
17. *Interest* on bonds, mortgages or deeds of trust, or other similar obligations of domestic corporations, joint-stock companies or associations, and insurance companies						9	4 4	77
Wife's income								
18. Fiduciaries * (excepting dividends from domestic corporations, which must be included as indicated in line 26 below)						2	8 6	85
Wife's income								
19. Partnership gains and profits, whether distributed or not. (*Net* gains or profits must be reported here)								
Wife's income								
20. Interest upon bonds issued in foreign countries and upon *foreign mortgages* or like obligations (not payable in the United States), and also dividends upon the stock or interest upon the obligations of foreign corporations, associations, and insurance companies engaged in business in foreign countries								
Wife's income								
21. Royalties from mines, oil wells, patents, franchises, or other legalized privileges								
Wife's income								
22. Other sources not enumerated above					1	9 4	5 0	0 0 5 00
Wife's income								
NOTE.—State here sources from which income entered on line 22 is received and amount received from each.								
23. Totals (NOTE.—Enter total of column A on line 5)	$	1 1	0 0 0	00	$ 1	9 4	9 2	0 8 0 42

EXHIBIT G TO AFFIDAVIT—Continued.

DESCRIPTION OF INCOME. NOTE.—If husband and wife render separate returns, only the income and deductions of the husband or wife (as the case may be) who renders *this return* shall be included herein; but if separate returns are not rendered by both husband and wife the income and deductions of both husband and wife shall be included separately as provided on this form.	A. Income on which the tax has been paid or is to be paid at the source.										B. Income on which the tax has NOT been paid or is not to be paid at the source.									
	Millions.			Thou.			Hundreds.			Cents.	Millions.			Thou.			Hundreds.			Cents.
24. Aggregate totals of columns A and B																				
25. Dividends on stock or from the net earnings of domestic corporations, joint-stock companies, associations, or insurance companies subject to like tax	$	....	3	2	6	1	8	4	2	79										
Wife's income																				
26. Dividends received through fiduciaries (see line 18)																				
27. Total dividends (to be entered on line 4)											$	....	3	2	6	1	8	4	2	79
28. Total gross income (to be entered on line 1)											$	2	2	7	6	4	9	2	3	21

* There should be included under this item all income received from guardians, trustees, executors, administrators, agents, receivers, conservators, or other persons acting in a fiduciary capacity.

C2—7857

GENERAL DEDUCTIONS.

NOTE.—Claims for deductions can not be allowed unless the information required below is clearly set forth.

	Millions.			Thou.			Hundreds.			Cents.
29. The amount of necessary expenses actually paid within the calendar year for which the return is made in carrying on any *individual business*. There *must not* be included under this head personal, living, or family expenses, business expenses of partnerships, or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions	$									
Wife's deduction										
NOTE.—State on the following lines the principal business, in which the above expenses were incurred.										
30. All interest paid within the year on personal indebtedness of taxpayer						9	9	0	5	56
Wife's deduction										
31. All national, State, county, school, and municipal taxes paid within the year (not including those assessed against local benefits)						1	3	6	1	54
Wife's deduction										

32. Losses actually sustained during the year incurred in trade or arising from fires, storms, or shipwreck, and not compensated by insurance or otherwise.....

Wife's deduction.....

NOTE.—State (*a*) of what the loss consisted, (*b*) when it was actually sustained, and (*c*) how it was determined to be a loss.

33. Debts past due which have been actually ascertained to be worthless and which have been charged off within the year.....

Wife's deduction.....

NOTE.—State (*a*) of what the debts consisted, (*b*) when they were created, (*c*) when they became due, and (*d*) how they were actually determined to be worthless.

34. Amount representing a reasonable allowance for the *exhaustion, wear, and tear of property arising out of its use or employment in business*. No deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return.....

Wife's deduction.....

NOTE.—State (*a*) what the property was on which depreciation is taken (if buildings, state when erected, of what material constructed, and value of same, as of January 1, of the calendar year for which this return is rendered), and (*b*) what percentage of depreciation is claimed.

35. Amount allowed to cover depletion, in case of mines and oil wells, not to exceed 5 per cent of the gross value at the mine or well of the output for the calendar year for which this return is rendered.....

Wife's deduction.....

NOTE.—State (*a*) cost of mine or well, (*b*) gross value at the mine or well of the output for the calendar year for which this return is rendered, and (*c*) what percentage of depletion is claimed.

36. Total "General Deductions" (to be entered on line 2)..... $ 2 3 5 4 4 88

NOTE.—If space is insufficient for answering any questions, attach a supplemental sheet to this return.

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING HIS OWN RETURN.

I swear (or affirm) that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all taxable gains, profits, and income received by me during the year for which the return is made, and that I am entitled to all the deductions and exemptions entered or claimed therein under the Federal income tax law of October 3, 1913.

Sworn to and subscribed before me this.....day of....., 191—.

[SEAL]

.....
(Signature of individual.)

.....
.....
(Official capacity.)

EXHIBIT 6 TO AFFIDAVIT—Continued.

AFFIDAVIT TO BE EXECUTED BY DULY AUTHORIZED AGENT MAKING RETURN FOR INDIVIDUAL.

I swear (or affirm) that I have sufficient knowledge of the affairs and property of ..... to enable me to make a full and complete return of the taxable income thereof, and that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all the taxable gains, profits, and income received by said individual during the year for which the return is made, and that the said individual is entitled under the Federal income tax law of October 3, 1913, to all the deductions and exemptions entered or claimed therein, and that I am authorized to make this return for the following reasons:

.....

.....

.....

.....

(Signature of agent.)

.....

(Post-office address of agent.)

Sworn to and subscribed before me this .....day of....., 191—.

[SEAL]

.....

.....

(Official capacity.)

INSTRUCTIONS.

1. This return shall be made by every citizen of the United States, whether residing at home or abroad, and by every person residing in the United States, though not a citizen thereof, having a *net income* of $3,000, or over, for the taxable year.

2. This return shall be made by every *nonresident alien* deriving any net income from property owned and business, trade, or profession carried on in the United States by him. No specific exemption is allowed nonresident aliens.

3. When an individual by reason of minority, sickness, or other disability, or absence from the United States, is unable to make his own return, it may be made for him by his *duly authorized* representative.

4. This return should be filed with the collector of internal revenue for the district in which the individual resides. In case the person resides in a foreign country, then with the collector for the district in which his principal business is carried on in the United States.

5. When the return is not filed within the required time by reason of sickness or absence of the individual, an extension of time, not exceeding 30 days from March 1, within which to file such return *may be* granted by the collector, *provided* a written application therefor is made by the individual within the period for which such extension is desired.

6. This return, properly filled out, must be made under oath or affirmation. Affidavits may be made before any officer *authorized by law* to administer oaths.

7. An unmarried individual or married individual not living with husband or wife shall be allowed an exemption of $3,000. When husband and wife live together they shall be allowed jointly a total exemption of only $4,000 on their aggregate income. Either husband or wife may make, sign, and verify a return of their joint income. Where husband and wife have separate incomes they make a joint return of such separate income, both subscribing to the return, or they may make separate returns of their respective incomes, but in no case shall they claim or be allowed more than $4,000 exemption on their aggregate incomes.

8. Amounts charged on line 29 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 34, must not exceed the deterioration of the property in one year.

c2—7357

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EXHIBIT 7 TO AFFIDAVIT.

Law offices
William A. Glasgow, jr.
1018 Real Estate Trust Building.
Broad & Chestnut Streets.

PHILADELPHIA, *January 22nd, 1918.*

MR. L. F. SPEER,
Deputy Commissioner,
Office of Commissioner of Internal Revenue,
Treasury Department, Washington.

MY DEAR MR. SPEER: Referring to the question of income tax on the issue of securities of the E. I. duPont de Nemours & Company in 1915, which has been the subject of investigation, and about which I have heretofore written you.

I represent Mr. Alfred I. duPont, a stockholder at Wilmington, Del., and several others, and before any attempt is made to assess any stockholders, I think it very important that the commissioner should give us a hearing, especially in view of the case of Towne vs. Eisner, decided by the Supreme Court of the United States on January 7th, and the principles of which I contend govern under the facts of the matter. I therefore earnestly ask that before anything is done, a hearing should be had.

Suggestion was made to me as to preparing a brief of the facts. Representing Mr. Alfred I. duPont, I have no free access to the books of the duPont Company, and I have been trying to get the information upon which to prepare this accurate statement of facts. I have been unable to do so up to the present time, but will hope to do this in the near future.

Very truly,

WAG/G. WM. A. GLASGOW, JR.

90

EXHIBIT 8 TO AFFIDAVIT.

UNITED STATES FOOD ADMINISTRATION,
LAW DEPARTMENT,
Washington, D. C., March 26, 1918.

MR. L. F. SPEER,
Assistant Commissioner of Internal Revenue,
Treasury Department, Washington, D. C.

MY DEAR MR. SPEER: Referring to our conversation last Saturday and to the matter of income tax of Mr. Alfred I. duPont, you directed an inquiry as to whether this matter was not controlled by the case of Towne v. Eisner, and I am hopeful that the conclu-

sion reached will be the one that I have already reached—that the matter is controlled by that case. Will you drop me a line as to your view after you are advised on that subject? And if there is to be a hearing, I want to thank you for having postponed the same until the 15th day of May.

Believe me,

Very sincerely yours,

WM. A. GLASGOW, JR.

WAGJr-g.

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91 EXHIBIT 9 TO AFFIDAVIT.

APRIL 1, 1918.

IT:PA.
JEH.

MR. WILLIAM A. GLASGOW, JR.,
United States Food Administration,
Washington, D. C.

SIR: This office is in receipt of your letter of March 26th, 1918, in which you request an extension of time from April 2, 1918, to May 15, 1918, for the hearing on the income-tax liability of Alfred I. duPont, of Wilmington, Delaware.

In reply you are advised that the question of Mr. duPont's liability is still under investigation, and when the investigation is completed and before final action has been taken this office will notify you, and if a hearing is found necessary your request will be granted.

Respectfully,

Deputy Commissioner.

EB.

MARCH 16, 1918.

IT:PA.
CEK.

MR. WILLIAM A. GLASGOW, JR.
1018 Real Estate Trust Building,
Philadelphia, Pa.

SIR: This office has before it your letter of January 22, 1918, in which you ask to be granted a hearing in the case of Mr. Alfred I. duPont, Wilmington, Delaware, a stockholder of E. I. duPont de Nemours & Company.

A hearing is hereby granted, to be held at 10.30 a. m., Tuesday, April 2, 1918, in room 322 Treasury Building, Washington, D. C.

It will be necessary for you to submit, at least ten days prior
92 to the date of the hearing, a brief containing a complete statement of the facts which you wish to present.

Respectfully,

MBD.

EXHIBIT 10 TO AFFIDAVIT.

UNITED STATES FOOD ADMINISTRATION,
LAW DEPARTMENT,
Washington, D. C., April 24, 1918.

Subject: Alfred I. duPont et al. income tax.

Mr. L. F. SPEER,
Assistant Commissioner of Internal Revenue,
Treasury Department, Washington, D. C.

MY DEAR MR. SPEER: Referring to the above matter, about which I saw you yesterday, Tuesday, morning: I understand the situation to be now, in view of your letter to me of April 1, as confirmed in our conversation, that the "question of Mr. duPont's liability is still under investigation, and when the investigation is completed and before final act'on has been taken" that you will notify me, and "if a hearing is found necessary" my request for a hearing will be granted.

If you could put me in touch with the proper man in your organization to consider this question, I think I have in my possession all of the documentary material which it would be necessary for him to have; and as I am so firm in my conclusion that the matter is entirely governed by the case of Towne v. Eisner, I think I could convince the proper representative of your bureau.

Believe me,

Very truly yours,
WAGJr–g.

WM. A. GLASGOW, JR.

93

APRIL 24, 1918.

IT : PA.
ERF.
INTERNAL REVENUE AGENT,
Baltimore, Maryland.

Referring to your report of November 30, 1917, relative to the investigation which was conducted by Income Tax Inspector D. P. DuRoss of the returns filed by Alfred I. duPont, Wilmington, Delaware, it is desired by this office that the investigation of this case be completed on the earliest date possible.

Please make special the reinvestigation of this case which should be conducted in the light of office letter dated April 1, 1918, which was addressed to you in reference to the matter.

An early report is requested.

Deputy Commissioner.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Baltimore, Md., April 1, 1918.

IT—Alfred I. duPont, Wilmington, Del.

COMMISSIONER INTERNAL REVENUE.

I am enclosing transcript for 1916 of Alfred I. duPont, which should have been returned to you in my report of November 30, 1917.

E. A. FORBES,
Internal Revenue Agent.

JMW/H.
Enc.

94 In re Alfred I. duPont, Wilmington, Delaware.

APRIL 21, 1920.

IT : I : FAR : P.
WEL.
MR. WILLIAM A. GLASGOW, JR.,
c/o Alfred I. duPont, Wilmington, Delaware.

SIR: In compliance with your request submitted at a conference held February 2, 1920, in connection with the income tax liability of the above-named taxpayer, that you be informed as to whether a loss would be allowed the taxpayer in 1918 concerning the payment of the dividend in debenture stock of the Delaware Corporation, you are advised as follows:

It is the opinion of this office that the transaction referred to, which took place in January, 1918, is a distribution in final liquidation of the E. I. duPont de Nemours Powder Company. The loss or gain to be reported would be the difference between the market value of the shares of stock of the old corporation on March 1, 1913, and the market value of stock of the new corporation at the time of receipt, plus the cash consideration accepted in exchange for the old stock surrendered.

If the taxpayer elected to receive stock instead of the cash consideration, the loss or gain to be reported would be computed on the basis of the above, plus the value of the stock received in exchange for the old stock surrendered.

You are further advised that the taxpayer should submit a claim for refund, if it is shown that he has suffered a loss in this final liquidation in 1918, or submit an amended return if the facts disclose a profit in the transaction.

Respectfully,

(Signed) G. V. NEWTON.
Deputy Commissioner.

MFD: ELC—2.

95 EXHIBIT 11 TO AFFIDAVIT.

SEPT. 6, 1918.

IT:PA.
JEH.

Mr. ALFRED I. DUPONT, *Wilmington, Del.*

SIR: In order to complete the audit of your income tax return for 1915, you are requested to file a statement in reply to the following questions:

1. The number of shares owned by you and the fair market value per share of the E. I. duPont de Nemours Powder Company stock as of March 1, 1913.

2. Did you purchase any of such stock after March 1, 1913, and what did it cost per share?

3. The fair market value of the E. I. duPont de Nemours and Company stock (the new company) at time said stock was received in exchange for the stock of the old company.

4. The exact date you received your shares of stock in the new company and the manner in which you determined the fair market value of same.

5. The number of shares of stock owned by you in powder company at time of distribution of the new company's stock and the number of shares of new stock received in exchange for the old.

An early reply will be appreciated.

Respectfully,

Acting Deputy Commissioner.

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96 EXHIBIT 12 TO AFFIDAVIT.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Baltimore, Md., July 30, 1919.

IT:Alfred I. duPont, Wilmington, Del.
Dist. Md., 1913–1917.
Reinvestigation 1915.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Under date of the 22d inst., Internal Revenue Agents Jos. N. Benners and D. P. DuRoss reported as follows:

"In accordance with ruling of department regarding the 200% distribution made during the year 1915 by E. I. duPont de Nemours & Co., we have reinvestigated 1915 return of the above-named individual, including herein profit from the said distribution. Also extended the investigation to cover the year 1917. For 1913, 1914, and 1916, see original report.

Additional tax disclosed.

1915.	Original report	$2,042.07
1915.	Supplemental report	1,361,500.35
	Total	$1,363,542.42
1917		1,414.05
	Total	$1,364,956.47

1915 (further revised).

INCOME.

		A.	B.
	Salaries	$11,000.00	$4,000.00
	Rents		17.80
	Interest notes		9,444.77
97	Interest bonds		28,612.85
	Other sources		19,450,005.00
	Totals	$11,000.00	$19,492,080.42
	Aggregate totals A and B		$19,503,080.42
	Dividends		3,261,842.79
	Total gross income		$22,764,923.21

DEDUCTIONS.

Interest	$9,905.56	
Taxes	13,639.32	
		$23,544.88
Net income		$22,741,378.33
Dividends	$3,261,842.79	
Source	11,000.00	
Specific exemption	4,000.00	
		3,276,842.79
Income subject to normal tax		$19,464,535.54
Normal tax 1%		$194,645.36
Surtax $30,000.00 at 1%		300.00
" 25,000.00 at 2%		500.00
" 25,000.00 at 3%		750.00
" 150,000.00 at 4%		6,000.00
" 250,000.00 at 5%		12,500.00
" 22,241,378.33 at 6%		1,334,482.70
Total tax liability		$1,549,178.06
Tax paid		185,635.64
		1,363,542.42
Additional tax original report		2,042.07
Additional tax		$1,361,500.35

98 Source of additional tax:

Salaries $11,000.00 and $4,000.00, column A and B, respectively, received from E. I. duPont de Nemours Co., Wilmington, Del. Amount in (A) representing amount in excess of exemption claimed.

Interest on bonds $28,612.85 correct and properly belongs in col. (B), exemption having been claimed on the whole amount.

Other sources, original report, none, revised report $19,450,005.00 which represents profit from the 200% distribution, made during October, consisting of two shares common stock of this company for each share held in the E. I. duPont de Nemours Powder Co.

Following Law Opinion 557, which holds this distribution to be in the nature of a liquidating dividend, the additional taxable income is determined as follows:

Shares of E. I. duPont de Nemours Powder Co. held:		
March 1, 1913		37,767
Shares acquired subsequently		None.
Shares held October 1, 1915		37,767
Shares of E. I. duPont de Nemours & Co. received during October, 1915		75,534
Value $347.50 per share on 75,534 shares		$26,248,065.00
Fair market value per share of shares held 3/1/13, $180.00 37,767		6,798,060.00
Profit		$19,450,005.00

Amount subject to normal and additional tax from this source.

Dividends $3,214,289.39 reported should be $3,261,842.79, increase $47,553.40, consisting of $40,000.00 cash dividends omitted in error, and $7,553.40 representing understatement of a dividend received in lieu of cash, payable in preferred stock of the Atlas Powder Co. This dividend was originally reported at an estimated value instead of its capitalized value.

99 Deductions correct except taxes; amount originally reported $2,051.54 should be $13,639.53, a difference $11,587.78 representing income tax omitted in original return.

Unsigned amended return attached, respondent declining to sign either amended return or waiver.

1917 (revised).

Block D—Gross rents		$1,391.66
" F—Dividends:		
1913	$19,166.67	
1916	$129,073.57	
		4,551,045.65
Total, A to F, inclusive		4,552,437.31
Block H—Interest, bonds	$242,924.75	
" " Foreign	5,000.00	
" " Bonds, etc	22,000.48	
		269,925.23
Total, all sources		$4,822,362.54
Block J—Interest	$7,675.81	
Taxes	5,484.12	
		13,159.93
Block K—Net income		$4,809,202.61
Less contributions		119,396.40
O—Net income		$4,689,806.21
Dividends	$4,551,045.65	
Exemption	2,400.00	
		4,553,445.65

Amount subject to 1917 normal		136,360.56
Less additional exemption		2,000.00
Amount subject to 1916 normal		$134,360.56
1917 normal tax		$2,727.21
1916 " "		2,687.21
100 Total normal tax		$5,414.42
Less tax withheld at source		None.
Balance normal tax		$5,414.42
Surtax, 1917:		
$2,000,000.00	$1,050,300.00	
$2,689,806.21@63%	1,694,577.91	
		2,744,877.91
Total, 1917 rates		$2,750,292.33
Dividends 1916 earnings $129,075.57@13%		16,779.56
Dividends 1913 earnings $19,166.67@6%		1,150.00
Total tax liability		$2,768,221.89
Total tax paid		2,766,807.84
Additional tax		$1,414.05

Sources of additional tax:

Total income from all sources originally overstated 1c. (Block H), Block J.

Interest reported $8,532.35 should be $7,675.81, decrease $856.54, representing amount paid on loans for purchase of 3½% Liberty bonds, disallowed.

Taxes reported $5,703.12 should be $5,484.12, decreased $219.00, representing tax withheld at source on non-tax-free bonds to which taxpayer is entitled to refund from withholding agent.

Contributions reported $120,431.40 should be $119,396.40, difference $1,035.00 representing police pension fund $10.00, Lippincott Relief Ass'n $25.00 (an employees' association), and Aero Club of America $1,000.00, disallowed.

Dividends shown to be received from 1913 and 1916 earnings were supported by letters from the issuing corporations.

101 I therefore recommend that this individual be assessed as follows under the act of September 8, 1916, as amended by the act of October 3, 1917, and under the act of October 3, 1917:

Income tax for 1917	$1,414.05

The amount of additional tax for 1915 is disclosed by carrying out the instructions in your letter of September 21, 1918, subject IT:PA:SC—Francis I. duPont.

In determining the profits alleged to have resulted in 1915 from the distribution of two shares of common stock of E. I. duPont de Nemours & Co., or new company, for each share held in the E. I. duPont de Nemours Powder Co., or old company, the examining officers have taken $180.00 as the fair market value of the old common stock as of March 1, 1913, and $347.50 as the fair market value of the new stock at the time it was distributed. It is my understand-

ing that these amounts were fixed by the advisory board. At any rate, they were given to Mr. DuRoss before he left Washington to resume his work on verification of these returns.

As the taxpayer has declined to sign an amended return or waiver for 1915, I recommend that suit be instituted under the Act of October 3, 1913, for $1,363,542.42.

Amended return for 1915, unsigned, is herewith enclosed.

Copy of this report has been sent to Collector Miles.

T. H. McDANNEL,
Internal Revenue Agent in Charge.

JMW–MWT.
Enc. (1).

EXHIBIT 13 TO AFFIDAVIT.

In re Alfred I. duPont, Wilmington, Delaware.

IT:IA:RAA:P.
JGB–16421808.

DEC. 12, 1919.

INTERNAL REVENUE AGENT IN CHARGE, *Baltimore, Maryland.*

Reference is made to your report dated November 30, 1917,
102 and supplemental reports dated April 19, 1918, and July 30, 1919, covering an investigation by examining officers Joseph N. Benners and D. P. DuRoss, of the income tax liability of the above-named individual, for 1913 to 1917, inclusive, which as audited in this office indicates further taxes for 1913, 1915, 1916, and 1917 and an overpayment for 1914.

The further tax for 1913, $2,584.19, has been assessed.

In accordance with section 252, revenue act of 1918, the overpayment of $978.61 for 1914 has been applied against the further tax for 1915, $1,576,994.47, and the balance, $1,576,015.86, together with the further tax for 1916, $442.00, and for 1917, $1,235.71, a total of $1,577,693.57 will be assessed on the next list furnished the collector of internal revenue for the district of Delaware.

The audit in this office discloses an overpayment for 1914 of $978.61, due to allowing credit for the tax paid at source in excess of the correct normal tax liability.

The difference in the tax due for 1915 as shown by your supplemental report dated July 30, 1919, and that stated above, is due to treating as income the dividend of 75,534 shares of stock of E. I. duPont de Nemours and Company, received by the taxpayer by reason of his ownership of 37,767 shares of the stock of the E. I. duPont de Nemours Powder Company. The value of this stock as of date of receipt was $347.50 per share as determined from facts submitted to this office.

Previous office holdings in the case are superseded by the above, which is based on a more complete statement of facts than was available when the earlier conclusions were reached.

The item of taxes paid within the year as shown by the examining officers' report is reduced $978.61, due to the overpayment of tax for 1914 of a like amount.

These adjustments result in increasing the further tax as recommended by the examining officers from $1,361,500.35 to $1,576,994.47.

103 The excess of the wife's dividends over the normal taxable income for 1917, $4,458.71, has been applied against the husband's net income before computing the normal tax, which results in a further tax of $1,235.71 instead of $1,414.05, as recommended by the examining officer.

The taxpayer should be advised of the result of the office audit.

A copy of this letter will be furnished the collector of internal revenue for the district of Delaware.

Acting Assistant to the Commissioner.

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104 EXHIBIT 14 TO AFFIDAVIT.

JANUARY 1, 1920.

Alfred I. duPont, Wilmington, Delaware.

Mr. H. T. GRAHAM,

Collector of Internal Revenue, Wilmington, Del.

DEAR SIR: I am returning herewith your statement of December 31, 1919, wherein you demand payment of income tax which you claim to be due on account of income received by me during the year 1915.

I beg to call your attention to the following basic facts: That income tax assessed on income received during the year 1915 is assessed under the act of October 3, 1913, which act specially provides as follows: That assessments under the law are limited to "any time within three months after said return is due."

I will ask you to note that inasmuch as my return for income tax received during the year 1915 was due and was filed on or before March 15, 1916, that the limit of time in which assessment could have been made expired March 15, 1919, and that, therefore, under the act of October 3, 1913, no further assessment on income received during the year 1915 can be made subsequent to that date. Therefore, your demand for payment at this time is improper and illegal.

Yours truly,

ALFRED I. DUPONT.

EXHIBIT 15 TO AFFIDAVIT.

TAXPAYERS CONFERENCE.

Taxpayer: Alfred I. duPont.
Address: Wilmington, Delaware.
Represented by: Wm. A. Glasgow, jr.
Matter presented: Request for basis of the computation of the tax assessed in his 1915 return in connection with two hundred

105 per cent dividend received by the stockholders of the E. I. duPont de Nemours Powder Company.

Could the taxpayer claim a loss on the sale of the stock received from this dividend based on the value at which it was included in his return as income and the sale price in the year in which the stock was sold?

Further, could the taxpayer claim a loss on the old stock of the E. I. duPont de Nemours Powder Company based on its March 1st value and a value received in the final liquidation of this corporation in January, 1918?

Could the taxpayer postpone the filing of his claim for the abatement of this additional tax until a decision had been reached by the courts of Pennsylvania in the case of Philip F. duPont?

The assessment of the tax was based on a decision of the department holding that the dividend received by this taxpayer from the E. I. duPont de Nemours Powder Company was a dividend in property of another corporation and taxable to the recipient at the fair market value of the stock on the date of receipt, which value has been determined to be $347.50 per share.

Under the provisions of the revenue act of 1918 and article 141, regulations 45, the taxpayer is permitted to claim a loss in transactions entered into for profit; therefore, any loss sustained by him in the sale of this stock would be allowable under the present act.

Concerning the loss to be allowed, if any, on the final liquidation of the E. I. duPont de Nemours Powder Company in January, 1918, Mr. Glasgow was informed that this matter had been submitted for an opinion and that he could expect a definite answer to this question within the next ten days.

Under the provisions of the law there was no authority granted for the postponement of a claim for abatement. He was advised to either pay the tax in accordance with the demand notice sent
106 by the collector or immediately file his claim for abatement as provided in the law.

Interviewed by:

J. G. BRIGHT,
Revenue Agents Audit Sub D.
Mr. LAWDER, *Chief.*
Mr. G. V. NEWTON,
Assistant Head of Unit.

Date: February 2, 1920.
JGB—EMB.

EXHIBIT 16 TO AFFIDAVIT.

CLAIM FOR ABATEMENT.

Taxes erroneously or illegally assessed.

Date of filing to be.

STATE OF .....
County of ..... } *ss:*

IMPORTANT.
This claim should be forwarded to the collector of internal revenue from whom notice of assessment was received.

Collector of internal revenue, income tax division, March 8, 1920, district of Delaware.

Plainly stamped here.

Write name so it can be easily read.

ALFRED I. DUPONT.
(Name of claimant.)

Nemours, Wilmington, Del.
(Address of claimant. Give street and number as well as city or town, and State.)

This deponent, being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant	Capitalist.
2. Character of assessment or tax	Income tax.
3. Amount of assessment	$1,576,015.86
4. Amount now asked to be abated	$1,576,015.86

107 Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

I. (a) That the assessment, if any, on which the tax so demanded is based was not made by the Commissioner of Internal Revenue within three years after March 1, 1916, the date on which deponent's return for the year 1915 was due, and that the action of the Commissioner of Internal Revenue in assessing a tax against deponent for the year 1915 after the 1st day of March, 1919, is null and void and of no legal force or effect.

(b) That the power and authority of the Commissioner of Internal Revenue to make an assessment against deponent for the year 1915 under the act of October 3, 1913, entitled "An act to reduce tariff duties and provide revenue for the Government, and for other purposes," expired on the 1st day of March, 1919; that the assessment, if any, on which the tax so demanded is based was made by the Commissioner of Internal Revenue after his legal power so to do had ceased, and that the said assessment and the tax are null and void.

II. (a) That said assessment and tax are based on a stock distribution or dividend made by E. I. duPont de Nemours Powder Company in the year 1915 to its stockholders, of which this deponent was one; that the shares of stock upon which this assessment and

tax are based were not income, taxable or otherwise, for the year 1915, and the assessment based thereon is illegal, null, and void.

(b) That the stock so received by deponent in the year 1915, upon which said assessment and tax was based, was not income of this deponent but was mere evidence of deponent's ownership in property already owned by him, and any assessment or tax thereon is erroneous, illegal, and void. Deponent submits that the rule laid down by the Supreme Court of the United States in the case of Towne vs. Eisner (245 U. S. 418) applies to the stock distribution
108 made by E. I. duPont de Nemours Powder Company in the year 1915, which is the basis of the alleged assessment and tax herein.

Write name so it can be easily read.

(Signed) ALFRED I. DU PONT.

Sworn to and subscribed before me this 8th day of January, 1920.

THOMAS C. CRONKIN,
Notary Public.
(Title.)

(This affidavit may be sworn to before a deputy collector of internal revenue without charge.)

CERTIFICATE OF ASSESSMENT.

I certify that an examination of the records of the commissioner's office shows the following facts as to the assessment and payment of the tax:

Name and address	Character of assessment or article taxed.	Period covered by assessment.	List.	Year.	Month.	Page.	Line.	Amount.

Assessment Clerk, Internal Revenue Bureau.

[Form 47.]

District Delaware.
Ind 1915.
(Nature of tax.)

Abatement Order No. ———.
Claimant, Alfred I. duPont.
Address, Wilmington.

109 Examined and submitted for action, ———, 19—.

Amount claimed, $1,576,051.86.
Amount allowed, $———.
Amount rejected, $1,576,051.86.

Committee on claims:

———
———
———

IT:R:C.
HHH.

Mr. Alfred I. duPont,
Nemours, Wilmington, Delaware.

Sir: Your claim for the abatement of $1,576,015.86, representing an additional assessment of individual income tax for the year 1915, has been examined.

The claim is based upon the statements that the additional assessment was not made within three years after March 1, 1916, the date on which your return for the year 1915 was due; that the act of assessing the tax against you for the year 1915, after March 1, 1919, is null and void; and that the alleged income on which the tax was assessed represented nontaxable stock dividends declared by E. I. duPont de Nemours Powder Company, a corporation organized under the laws of New Jersey.

With regard to the period of limitation for the assessment of additional tax, it is held, under the revenue act of 1913, that if discovery of an omission of income in the preparation of a return is made at any time within three years from the due date of the return, an additional tax may be assessed. Information which established that you were liable for additional tax was on file in this bureau prior to March 1, 1919. Therefore, since the date of discovery and not the date of assessment operates in fulfilling the requirements of the statute, the bureau was within its rights in levying the assessment.

In reference to the taxability of the dividends paid to you
110 by the E. I. duPont de Nemours Powder Company, a corporation organized under the laws of New Jersey, it appears that this was a 200% dividend in stock of the E. I. duPont de Nemours and Company, a corporation organized under the laws of Delaware. It has been held by the United States Supreme Court, in the case of the United States v. C. W. Phellis, decided November 21, 1921, that this dividend constitutes taxable income to the stockholder of the E. I. duPont de Nemours Powder Company.

Therefore no erroneous or excess assessment is disclosed, and your claim is rejected.

Respectfully,

Commissioner.

DE—4.

[Copy.]

JANUARY 1, 1920.

Mr. H. T. GRAHAM,

Collector of Internal Revenue, Wilmington, Del.

DEAR SIR: I am returning herewith your statement of December 31, 1919, wherein you demand payment of income tax which you claim to be due on account of income received by me during the year 1915.

I beg to call your attention to the following basic facts: That income tax assessed on income received during the year 1915 is assessed under the act of October 3, 1913, which act specially provides as follows: That assessments under the law are limited to "any time within three years after said return is due."

I will ask you to note that inasmuch as my return for income tax received during the year 1915 was due and was filed on, or before, March 15, 1916, that the limit of time in which assessment could have been made expired March 15, 1919, and that, therefore, under the act of October 3, 1913, no further assessment on income re-
111 ceived during the year 1915 can be made subsequent to that date. Therefore, your demand for payment at this time is improper and illegal.

Yours truly,

(Signed) ALFRED I. DUPONT.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Wilmington, Del., March 8, 1920.

Commissioner of Internal Revenue, Washington, D. C.

Alfred I. duPont.

Replying to your letter of February 2, 1920, file IT:E BKH we are enclosing herewith claim for abatement filed by Alfred I. duPont.

H. T. GRAHAM,
Collector.

REC/RD.

EXHIBIT 17 TO AFFIDAVIT.

MARCH 5, 1920.

IT:Cl. EHB.

Mr. F. S. BRIGHT,

Colorado Building, Washington, D. C.

SIR: Reference is made to your communication of February 16, 1920, relative to the procedure to be employed in definitely estab-

lishing the taxibility of distribution of stock received by certain of your clients in the E. I. duPont de Nemours & Company, a Delaware corporation.

Information is contained therein to the effect that abatement claims have been filed by all of these taxpayers who have thus far been assessed as a result of this stock distribution and that similar claim will be filed by all others who will be hereafter assessed under the same conditions. You state that you have suggested to your clients that one of the claims for abatement be withdrawn, the tax paid under protest, and a claim for refund filed
112 with the department which shall be disposed of as expeditiously as possible; and that after the claim for refund has been denied you will immediately file suit in the Court of Claims in order that you may get a speedy judicial disposition of the case. You ask the cooperation of the bureau to expedite the disposition of the case. You further request that the remaining claims for abatement be permitted to await the decision of the Supreme Court with the understanding that whatever that decision may be the claimant will immediately pay the tax due without suit or legal steps necessary in the collection of the taxes.

In reply, you are informed that if you will indicate the claimant whose case will be used to make a test this office will expedite the handling of the claims for abatement and refund. The bureau, however, can not consistently consent to withhold the collection of the tax of the other claimants in the interim. To adopt such a procedure in these and similar cases would have the effect of indefinitely suspending the collection of large amounts of taxes urgently needed by the Government which, in many instances, are ultimately held to have been lawfully and legally assessed.

This office will consent in the instant cases to withhold action on the claims for abatement of your clients provided you furnish a list of the same showing the amounts claimed as being erroneously assessed. You no doubt appreciate the fact that collectors of internal revenue are responsible for the collection of all taxes due and that a claim for abatement acts as a stay for the payment of the taxes only in the event that the collector is satisfied that the interests of the Government are not jeopardized. The Commissioner of Internal Revenue has no authority to instruct a collector to withhold the collection of any taxes assessed. If the collector of internal revenue for the district in which your clients are located require the claimants to file bonds for the payment of the taxes such action will be taken to protect their interests and the Government's interests.

You no doubt understand that if the decision of the Supreme
113 Court is adverse to your client that interest at the rate of one per cent a month will attach to the taxes assessed which have not been paid as a result of a claim for abatement being filed.

Respectfully,

Commissioner.

BUREAU OF INTERNAL REVENUE,
INCOME TAX UNIT, *March 10, 1920.*

Mr. MORMAN: You no doubt are aware that there are two factions of stockholders of the duPont Company. The attached claim is from the members of one faction, who, I think, is willing to pay the taxes but thinks it better to wait until a decision of the court. If we agree to withhold action for claims for abatement of those members of the faction represented by Mr. Bright, the Washington attorney, I think the same courtesy should be extended to the other faction. The claim herewith has been forwarded from the collector for the district of Delaware. He was told in office letter that he could accept the claim and not to enforce the payment if he was of the opinion that the Government's interests were fully protected. If any action is taken upon this claim please specifically advise me.

G. M.

R. J. BRIGHT
F. S. BRIGHT
H. HINRICHS
Attorneys at Law
Colorado Building
Washington, D. C.

R. R. BRIGHT

FEBRUARY 16, 1920.

Hon. COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

SIR: I represent most of the stockholders of the duPont Powder Co., a New Jersey corporation, who, in 1915, each received for each share of stock of the New Jersey company held by him two shares of the stock of E. I. duPont de Nemours & Co., a Delaware corporation organized to take over the assets of the duPont Powder Co., the New Jersey corporation.

Recently several of these stockholders have received assess-
114 ments in which this distribution of stock has been treated as a property dividend and the assessments have been paid in spite of the fact that more than three years, as limited by the statute in which assessments can be made, had previously elapsed.

There has been much discussion as to whether this distribution in 1915 was a property dividend or a stock dividend, and as such covered by the decision in the Towne case.

Claims for abatement have been filed by all the stockholders whom I represent, to whom assessments have been sent, and additional claims will be filed for the others against whom assessments are laid.

In behalf of my clients I am suggesting that for one of them claim for abatement be withdrawn, tax paid under protest, and claim for refund filed with the department, which shall be as expeditiously disposed of as possible, assuming that in disposing of the claim for refund the lines already set out by the Government, treating this distribution of stock as a dividend of property will be followed, and as soon as this claim for refund has been denied, in behalf of the individual who is to be representative of all my clients, I will immedi-

ately file suit in the Court of Claims so that we will get as speedy a judicial disposition of the case as possible.

In doing this I would ask the cooperation of the bureau to expedite the disposition of the case, first by the Court of Claims, and then to get the Solicitor General to join with me in a motion in the Supreme Court to advance the case so that we can get a full determination of the question.

I am directed by my clients to say that if this course can be pursued and the claimants for abatement are permitted to await the decision of the Supreme Court, they will abide by that decision, whatever it may be, and pay whatever tax is due by them, following the decision of the court, without its being necessary for suit or other legal steps being taken to collect the taxes.

Respectfully,

F. S. BRIGHT.

FSB—F.

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115 EXHIBIT 18 TO AFFIDAVIT.

Court of Claims of the United States. No. 34554.

(Decided March 14, 1921.)

Charles W. Phellis v. the United States.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Plaintiff, Charles W. Phellis, a citizen of the United States, and a resident of the city of Wilmington, State of Delaware.

II.

On and prior to September 1, 1915, the plaintiff was the owner of 250 shares of the common stock of the E. I. duPont de Nemours Powder Co., a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the New Jersey Corporation.

III.

On the 19th day of August, 1915, the following letter was sent to the stockholders of the said New Jersey Corporation, and the proposal therein made was very shortly thereafter assented to by 89.7 per cent of the holders of the stock of said company.

WILMINGTON, DELAWARE, *August 19th, 1915.*

To the Stockholders of E. I. duPont de Nemours Powder Company:

The business of our company has greatly increased in volume so that it has become necessary to materially increase our capital to pro-

vide for proper and economical operation. Your officers have given the problem long and serious consideration, with the result
116 that the board of directors have approved a plan for the readjustment of its financial affairs, which plan may be briefly summarized as follows:

A new corporation, to be known as E. I. duPont de Nemours & Company, will be incorporated under the laws of the State of Delaware, which company will have three classes of stock, viz, 6 per cent cumulative nonvoting debenture stock, 6 per cent cumulative voting debenture stock, and common stock.

Except as to voting powers, the rights of both voting and nonvoting debenture stocks shall be identical, and the charter will provide:

Debenture shares shall bear cumulative dividends at the rate of 6 per cent per annum.

Debenture shares may be called for payment at $125 per share.

No mortgage or other specific lien may be placed upon the whole or any part of the property of the company without the consent of 75 per cent in amount of the total debenture stock outstanding, except that this provision shall not apply to purchase-money mortgages or to the assumption of mortgages or liens upon property purchased, nor shall it prevent the pledge for the purpose of securing cash to be used in the ordinary course of the business of the company of securities at any time held and owned by the company, provided such cash advances are secured on obligations of the company with maturities not more than three years from date hereof.

In case of dissolution (whether voluntary or involuntary) debenture shares shall have preference over the common stock on distribution of assets to the par amount thereof plus accumulated dividends.

The voting debenture stock shall have equal voting rights with the common stock.

The nonvoting debenture stock shall have no voting privileges except (a) in the event the company shall fail to pay any dividend thereon and such default shall continue for a period of six
117 months, in which event the voting and nonvoting debenture stockholders shall have the sole right of voting to the exclusion of the common-stock holders for the ensuing year and for each year thereafter until the company shall pay all accrued dividends on said debenture stock; and (b) in the event of the net earnings of the company in any calendar year amounting to less than 9 per cent on the amount of debenture stock issued and outstanding during such calendar year, then the nonvoting debenture stockholders shall have equal voting rights with the voting debenture stockholders and with the common-stock holders, which voting rights shall continue until the net earnings of the company for some future calendar year shall equal 9 per cent on the amount of debenture stock issued and outstanding in such future year.

This new corporation, E. I. duPont de Nemours & Company of Delaware, will purchase all the assets and assume all the liabilities

of our company and will pay therefor the sum of $120,000,000, as follows: $1,484,100 in cash; $59,661,700 par value in debenture stock; $58,854,200 par value in common stock. This will be all the stock that will be issued by E. I. duPont de Nemours & Company at this time.

Upon the consummation of said sale and when our company has received the stock of E. I. duPont de Nemours & Company an offer will be made to purchase the outstanding bonds and preferred stock of our company as follows:

(a) 5 per cent bonds (outstanding $1,230,000). This issue will be called for redemption under the provisions of the mortgage and paid for in cash.

(b) 4½ per cent bonds (outstanding $14,166,000). An offer will be made to purchase these bonds at par, payable in 6 per cent nonvoting debenture stock of E. I. duPont de Nemours & Company at par. Thus, a person holding $1,000 par value 4½ per cent bonds will receive in payment therefor $1,000 par value 6 per cent debenture stock.

118 (c) Preferred stock (outstanding $16,068,600). Our 5 per cent preferred stockholders will be given opportunity to accept either of the following offers:

For each $100 par value of our 5 per cent cumulative preferred stock there will be offered $100 par value 6 per cent cumulative nonvoting debenture stock of E. I. duPont de Nemours & Company. Thus, a person holding one share of preferred stock may exchange it for one share of debenture stock which will result in a 20 per cent increase in annual income; or

For each $100 par value of our 5 per cent cumulative preferred stock there will be offered $83⅓ par value 6 per cent cumulative voting debenture stock of E. I. duPont de Nemours & Company, with the privilege to the holder of this voting debenture stock of exchanging for nonvoting debenture stock at any time prior to April 25th, 1916, receiving therefor $100 par value nonvoting debenture stock for each $83⅓ of voting debenture stock.

(d) Common stock (outstanding $29,427,100). All of the common stock of E. I. duPont de Nemours & Company, of Delaware, will be distributed to the common-stock holders of our company as a dividend. In other words, a person holding one share of common stock in our company will continue to hold it and in addition will receive two shares of the common stock of E. I. duPont de Nemours & Company.

The above plan has been worked out as the result of the most mature deliberation and we are confident that it will appeal to our security holders as most desirable.

We therefore request you to sign the attached form of assent to the carrying out of this plan and return it to us at your earliest convenience, being careful to sign exactly as your name appears on your stock certificate.

Any information in connection with the matters herein referred to will be cheerfully furnished upon request.

Respectfully submitted.

PIERRE S. DUPONT,
President.

119 ASSENT OF STOCKHOLDERS.

(To be signed and returned to P. S. duPont, president.)

Whereas the board of directors of E. I. duPont de Nemours Powder Company have approved a plan for readjusting the financial affairs of that company, which plan may be summarized as follows:

(a) A new corporation to be known as E. I. duPont de Nemours & Company, will be incorporated under the laws of the State of Delaware, which company will have three classes of stock, viz, 6 per cent cumulative voting debenture stock, 6 per cent cumulative nonvoting debenture stock, and common stock. Except as to voting powers, the rights of each class of debenture stock shall be identical and shall be as follows: Cumulative six per cent dividends payable quarterly, with preference upon any distribution of assets to the extent of $100 per share and accumulated dividends in case of dissolution (whether voluntary or involuntary); the nonvoting debenture stock to have voting rights in common with the voting debenture stock, and to the exclusion of the common stock in case the company shall fail to pay any quarterly dividend thereon, and such default shall continue for a period of six months and to have equal voting rights with the voting debenture stock and common stock in case the earnings in any year shall amount to less than nine per cent of the amount of debenture stock issued and outstanding; both classes of debenture stock to be redeemable at any dividend date at $125 per share; no prior lien to be placed upon any of the property of the corporation without the consent of three-fourths of the combined debenture stock, but this shall not apply to current obligations for the procurement of working capital, which obligations shall not run for more than three years from the date thereof;

(b) To sell, assign, convey, and transfer to E. I. duPont de Nemours & Company all the assets of every nature of E. I. duPont de
Nemours Powder Company, subject to all the liabilities of
120 that corporation, including its bonds issues, and subject to any lien or charge securing any of said obligations, all of which obligations shall be assumed by E. I. duPont de Nemours & Company;

In consideration therefor the Delaware Corporation to pay $1,484,100.00 in cash, 588,542 shares of the common stock, and 596,617 shares of the debenture stock of E. I. duPont de Nemours & Company;

(c) The E. I. duPont de Nemours Powder Company to redeem its five per cent bonds at 105 per cent in cash; to offer to the holders of its 4½ per cent debenture bonds ten shares of said nonvoting de-

benture stock for each $1,000 of said bonds; to offer to the holders of its preferred stock at their option either one share of said nonvoting debenture stock for each share of said preferred stock, or $83⅓ par value of said voting debenture stock for each share of said preferred stock, and in case the latter option is exercised will further, at any time prior to April 25th, 1916, exchange any such voting debenture stock for nonvoting debenture stock by giving therefor one share of nonvoting debenture stock for each $83⅓ par value of said voting debenture stock;

And whereas, under the charter of said E. I. duPont de Nemours Powder Company, the written assent of two-thirds in amount of the stockholders of said company is necessary to said sale, conveyance, assignment, and transfer of its property, assets, right, and privileges as an entirety:

Now, therefore, we, the undersigned stockholders of E. I. duPont de Nemours Powder Company, hereby assent, for and on behalf of all the stock in said corporation held by us respectively, to the sale, conveyance, assignment, and transfer of all the property, assets, rights, and privileges of said corporation as an entirety to E. I. duPont de Nemours & Company hereinbefore referred to and for the consideration hereinbefore mentioned; and we further authorize the directors of said corporation to take such steps as may be necessary to carry out the same.

121 This assent, however, shall not become effective until such time as E. I. duPont de Nemours & Company shall have been organized, and the board of directors of said E. I. duPont de Nemours Powder Company shall have passed resolutions authorizing said sale, conveyance, assignment, and transfer, as above provided, for the consideration above mentioned, and further shall have authorized the offers of exchange of the said securities of the said E. I. duPont de Nemours & Company to the 4½ per cent bondholders and the preferred stockholders of said New Jersey corporation, and shall have authorized the redemption of said five per cent bonds of said corporation.

This assent may be executed upon separate forms with the same force and affect as though executed upon one instrument.

_____ _____.

(Sign here.)

In presence of—

_____ _____

Dated the _____ day of August, 1915.

IV.

As a result of said proposal and the assent thereto of said stockholders the plan set out in said proposal was carried out. The E. I. duPont de Nemours & Co., a corporation was organized under the laws of the State of Delaware (hereinafter called the Delaware corporation) and the following agreement between the New Jersey corpo-

ration and the Delaware corporation was entered into on the 16th day of September, 1915:

An agreement made this 16th day of September, A. D. 1915, by and between E. I. duPont de Nemours Powder Company, a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the "vendor," of the first part, and E. I. duPont de Nemours and Company, a corporation organized and existing under the laws of the State of Delaware, hereinafter called the "company," of the second part:

122 Whereas the vendor is the owner of the real, personal, and mixed property hereinafter described, which property the board of directors of the vendor, with the written assent of the holders of more than two-thirds of the capital stock of the vendor issued and outstanding, has offered to sell and convey to this company, as an entirety and as a going concern, for one hundred and twenty million dollars ($120,000,000), payable in cash and in the capital stock of this company as follows: One million four hundred and eighty-four thousand one hundred dollars ($1,484,100) in cash; fifty-eight million eight hundred and fifty-four thousand two hundred dollars ($58,854,200) in the common stock of the company at par, and fifty-nine million six hundred and sixty-one thousand seven hundred dollars ($59,661,700) in debenture stock of the company, of which debenture stock one hundred thousand (100,000) shares or any part thereof shall be voting debenture stock if demanded by the vendor; and

Whereas the company has been duly organized with an authorized capital stock of two hundred and forty million dollars ($240,000,000) divided into one million five hundred thousand (1,500,000) shares of nonvoting debenture stock; one hundred thousand (100,000) shares of voting debenture stock and eight hundred thousand (800,000) shares of common stock of the par value of one hundred dollars ($100) each; and

Whereas the board of directors of the company have ascertained, adjudged, and declared that the real, personal, and mixed property aforesaid are of the fair value of one hundred and twenty million dollars ($120,000,000), and that the acquisition thereof is necessary for the business of the company and to carry out its contemplated objects:

Now, therefore, this agreement witnesseth:

1. The vendor hereby agrees to sell, assign, transfer, and set over to the company, its successors and assigns, all its right, title, and interest in and to the following described property, to wit: All of the vendor's real, personal, and mixed property of every kind, nature, and description on the date of transfer and where-
123 soever situate, including water rights and all fixtures and appurtenances to real estate and easements therein; all manufacturing plants and machinery, tools, and appliances used in connection therewith; all raw materials, manufactured product, and

partially manufactured product wheresoever situated; all accounts and bills receivable; all stocks and bonds and all claims, demands, judgments, and choses in action of every kind, nature, and description; all patents, applications for patents, trade-marks, trade names, trade secrets, brands, and copyrights; all cash on hand and moneys in bank and all personal property of every kind, nature, and description.

The above enumeration is not to be taken as excluding any property or property rights not specifically mentioned in the above enumeration, but all the vendor's property, assets, rights, and privileges, including the good will of the business, is intended to be included in said sale. The real, personal, and mixed property above described to be sold and conveyed subject to the lien or charge imposed by that certain indenture made and executed June 1, 1906, between the vendor and the Guaranty Trust Company, of New York, as trustees, to secure the payment of an issue of sixteen million dollars ($16,000,000), par value of four and one-half per cent (4½ per cent) thirty-year gold bonds issued by the vendor, of which issue fourteen million one hundred and sixty-six thousand dollars ($14,166,000) par value are now outstanding and unpaid and subject to any and all other liens, mortgages, charges, or encumbrances of whatsoever kind and nature existing on the date of said sale. The consideration for said sale to be paid by the company shall be one million four hundred and eighty-four thousand one hundred dollars ($1,484,100) in cash; fifty-eight million eight hundred and fifty-four thousand two hundred dollars ($58,854,200) in the common stock of the company at par; and fifty-nine million six hundred and sixty-one thousand seven hundred dollars ($59,661,700) in debenture stock of the company, of which debenture stock one hundred
124 thousand (100,000) shares or any part thereof shall be voting debenture stock if demanded by the vendor; nonvoting debenture stock to be accepted in payment of the purchase price at par and voting debenture stock at one hundred and twenty dollars ($120) per share, with the option in the vendor at any time prior to April 25, 1916, to exchange voting debenture stock for nonvoting debenture stock on the same basis; i. e., the company shall be entitled to receive one hundred shares of nonvoting debenture stock for each eighty-three and one-third shares of voting debenture stock surrendered on or before April 25, 1916. The company shall also, as a part of the consideration for the property and business so sold, assume all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, due or to become due, of the vendor existing on the date of said transfer, except capital-stock liability and the funded debt of the vendor, consisting of one million two hundred and thirty thousand dollars ($1,230,000) of the five per cent (5 per cent) first mortgage and collateral trust gold bonds of the vendor now outstanding and unpaid, and fourteen million one hundred and sixty-six thousand dollars ($14,166,000) of

the four and one-half per cent thirty-year gold bonds of the vendor now outstanding and unpaid.

2. The company hereby agrees, in consideration of said sale and upon the execution by the vendor of this agreement and the delivery to it of a good and sufficient bill of sale assigning, transferring, and conveying all of the personal property and personal property rights aforesaid, to pay to the vendor the sum of one million, four hundred and eighty-four thousand, one hundred dollars ($1,484,100) in cash and to issue to the vendor or to such nominees as the vendor shall in writing hereafter direct, at such times and in such amounts as the vendor directs, certificates of stock of the company as follows: Five hundred and eighty-eight thousand, five hundred and forty-two (588,542) shares of the common stock of the company and five hundred and ninety-six thousand, six hundred and seventeen
125 (596,617) shares of the debenture stock of the company, of which debenture stock one hundred thousand (100,000) shares or any part thereof shall be voting debenture stock is demanded by the vendor, said voting debenture stock to be exchanged for non-voting debenture stock at any time prior to April 25, 1916, at the option of the vendor upon the basis of exchange hereinbefore set forth. All shares of the capital stock of the company so issued in payment for the property aforesaid shall be deemed to be and are hereby declared to be full-paid shares and not liable to any further call, and the holders of such stock shall not be liable to any further payment thereon.

The company hereby agrees, as part of the consideration for the sale of the property and business so sold, to assume and discharge all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, due or to become due, of the vendor existing on the date of said transfer, except capital-stock liability and the funded debt of the vendor hereinbefore specifically mentioned; and the vendor hereby agrees to hold the company harmless from the lien or charge on the property sold to secure the payment of the funded debt aforesaid.

3. It is agreed that any contract of the vendor existing on the date of said transfer that is not legally assignable without the consent of the other party or parties thereto shall be assigned subject to the assent to such assignment of such other party or parties thereto and, in the event any such other party or parties shall not assent to the assignment of any such contract, the vendor shall perform or cause to be performed the said contract for the use and benefit of E. I. duPont de Nemours and Company and at its sole expense, and all moneys due or thereafter becoming due thereon shall belong to the company.

4 The vendor hereby covenants and agrees with the company, upon the request and at the cost of the company, to execute and to do all such further assurances and things as shall reasonably
126 be required by the company for vesting in it the property and

rights agreed to be hereby sold, and giving to it the full benefit of this agreement.

In witness whereof the parties hereto have caused this agreement to be signed in their respective corporate names by officers duly authorized so to do and their respective corporate seals to be affixed on the day and year first above written.

E. I. DUPONT DE NEMOURS POWDER COMPANY,
By PIERRE S. DUPONT, *President.*

Attest:

L. R. BEARDSLEE, *Asst. Secretary.*
E. I. DUPONT DE NEMOURS AND COMPANY,
By IRENEE DUPONT, *President.*

Attest:

ALEXIS I. DUPONT, *Secretary.*

I, Alexis I. duPont, secretary of E. I. duPont de Nemours and Company, hereby certify that the foregoing is a full and true copy of an agreement between E. I. duPont de Nemours Powder Company and E. I. duPont de Nemours and Company, dated the 16th day of September, 1915, as taken from and compared with the original agreement on record in my possession.

Witness my hand and the seal of the company this 14th day of May, 1920.

[SEAL.] ALEIXIS I. DUPONT.

V.

On October 1, 1915, said New Jersey corporation, by bill of sale, in pursuance of said proposal of August 19, and said agreement of September 16, transferred to the Delaware corporation all its assets every description, said bill of sale reading as follows:

Know all men by these presents:

That E. I. duPont de Nemours Powder Company, a corporation organized and existing under the laws of the State of New Jersey,
of the first part (hereinafter referred to as "vendor"), in
127 consideration of the sum of one million four hundred eighty-
four thousand one hundred dollars ($1,484,100) cash, and other valuable consideration to it in hand paid by E. I. duPont de Nemours and Company, a corporation organized and existing under the laws of the State of Delaware, of the second part (hereinafter referred to as the "vendee"), receipt whereof is hereby acknowledged, has bargained, sold, conveyed, transferred, assigned, and delivered, and by these presents does bargain, sell, convey, transfer, assign, and deliver unto the said vendee all of the vendor's property and assets, and all of the vendor's personal property and personal property rights of whatsoever kind, nature, and description, and wheresoever situate, including the good will of its business, and all its trade-

marks, trade names, trade secrets, brands, and copyrights; and all its machinery, tools, and appliances, in and in connection with its manufacturing plants and otherwise; and all its raw materials, manufactured product and partially manufactured product, wheresoever situate; and all accounts and bills receivable; and all its stocks and bonds; and all its claims, demands, judgments, choses in action, matured or otherwise, of every kind, nature, and description; all its patents and applications for patents; and all cash on hand and money in bank; and also all horses, mules, and live stock of every kind, nature, and description, wheresoever situate; and all transportation fixtures and equipment of every kind, nature, and description including all locomotives, freight cars, tank cars, and track material; and all ships, boats, tugs, barges, and vessels of every kind, nature, and description, and wheresoever, situate, including chartered or rented vessels. The foregoing enumeration is not to be taken as excluding any personal property or personal property rights not specifically mentioned in the above and foregoing enumeration, but all the vendor's personal property, personal assets, and personal rights and privileges is intended to be included in said sale: Provided however, That all the above-described and intended property is sold and conveyed subject
128 to the lien or charge imposed by that certain indenture made and executed June 1, 1906, between the vendor and the Guaranty Trust Company of New York, as trustee, to secure the payment of an issue of sixteen million ($16,000,000) par value of four and one-half per cent (4½ per cent) thirty-year gold bonds issued by the vendor, of which issue fourteen million one hundred sixty-six thousand dollars ($14,166,000) par value are now outstanding and unpaid, and subject to any and all other liens, charges, and encumbrances of whatsoever kind and nature existing on the first day of October, 1915.

To have and to hold all and singular the said property and property rights unto the said vendee, its successors and assigns, absolutely, to its and their own use and behoof forever.

It is understood that any contract of the vendor now existing that is not legally assignable without the consent of the other party or parties thereto is hereby sold and assigned subject to the assent of such other party or parties to such assignment, and in the event that any such other party or parties shall not assent to the sale and assignment of any such contract, the vendor shall and does hereby agree to perform or cause to be performed the said contract for the use and benefit of the vendee, but the sole cost and expense of the vendee, and all moneys due or thereafter becoming due thereon shall belong to said vendee.

The vendee hereby agrees as a part of the consideration for the sale of the property and rights so sold to assume and discharge all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, of the vendor, existing on the

first day of October, 1915, whether due or to become due, excepting capital stock and funded debt liability of the vendor.

The vendor hereby agrees to hold the vendee harmless from any lien or charge on the property hereby sold to secure the payment of the said funded debt of the vendee.

The vendor for itself, its successors, and assigns, hereby cove-
129 nants and agrees with the vendee, its successors and assigns, that upon the request but at the cost of the vendee it will execute any and all such further assurances as shall reasonably be required for vesting in the vendee, its successors and assigns, the property and rights hereby sold, and giving to it and them the full benefit of this conveyance.

In witness whereof the parties hereto have caused these presents to be executed in triplicate by their respective officers thereunto duly authorized, and their respective corporate seals to be hereto affixed and attested as of the first day of October, A. D. 1915.

E. I. DUPONT DE NEMOURS POWDER COMPANY.
By PIERRE S. DUPONT, *President.*

Attest:

ALEXIS I. DUPONT, *Secretary.*
E. I. DUPONT DE NEMOURS AND COMPANY,
By H. M. BARKSDLAE, *Vice President.*

Attest:

L. R. BEARDSLEE, *Asst. Secretary.*

I, Alexis I. duPont, secretary of E. I. duPont de Nemours Powder Company, hereby certify that the foregoing is a full and true copy of a bill of sale conveying all of the personal property and personal property rights of E. I. duPont de Nemours Powder Company to E. I. duPont de Nemours and Company, which bill of sale is dated the 1st day of October, 1915, as taken from and compared with the original bill of sale on record in my possession.

Witness my hand and the seal of the company this 14th day of May, 1920.

[SEAL.] ALEXIS I. DUPONT, *Secretary.*

Pursuant to said agreement of September 16, 1915, and upon the execution and delivery of said bill of sale from the New Jersey corporation to the Delaware corporation, and to carry out the terms of said agreement, the Delaware corporation delivered to the New
Jersey corporation 588,342 shares of its common stock of the
130 par value of $100 per share and 596,617 shares of its debenture stock of the par value of $100 per share and of the accepted value of $59,661,700, and said New Jersey corporation retained $1,484,400 in cash with which to redeem its outstanding 5 per cent debenture bonds.

In addition to said debenture stock of said Delaware corporation said New Jersey corporation then held cash in the sum of $1,484,400

fficient to pay its outstanding 5 per cent bonds to the amount of ,230,000. It also held debenture stock of the Delaware corporation exchange for the outstanding preferred stock of the New Jersey rporation to the amount of $16,068,801.34 and to exchange for the utstanding 4½ per cent bonds of said New Jersey corporation to the nount of $14,166,000, and further, said New Jersey corporation held ne debenture stock of the Delaware corporation equal in amount to ne outstanding common stock of the New Jersey corporation, and also held two shares of the common stock of the Delaware corpoation for each share of its, the New Jersey corporation, common tock outstanding.

VII.

Upon the execution of said transfers, in pursuance of said proosal of August 19 and said agreement of September 16, the New ersey corporation distributed as of October 1, 1915, to each holder f its common stock two shares of the common stock of the Delaware orporation, and the original holders of the common stock of the New ersey corporation continued each to hold his original shares of said tock, and as of October 1, 1915, the Delaware corporation took over ll the assets (excepting the aforesaid $1,484,100) theretofore held by he New Jersey corporation, and the New Jersey corporation thereafter held the cash and the debenture stock above described. Plaintiff received his 500 shares of the common stock of the Delaware
131 corporation and continued to hold his original 250 shares of the common stock of the New Jersey corporation.

VIII.

The personnel of stockholders and officers of the two corporations was, on October 1, 1915, identical, the Delaware corporation having elected the same officers as the New Jersey corporation, and said holders of common stock of said corporations had each the same proportionate stock holding in both corporations; that is to say, on October 1 each owner of one share of stock of the New Jersey corporation was also the owner of two shares of stock of the Delaware corporation.

IX.

The New Jersey corporation has received as income upon the debenture stock of the Delaware corporation held by it against its capital stock dividends to the amount of 6 per cent per annum, which it has paid out to its preferred and common stockholders, including plaintiff.

X.

The New Jersey corporation, after the distribution of the stock of the Delaware corporation, continued as a going concern and is still in existence, but, except for the collection and payment of said

dividends and the redemption of its outstanding bonds, and the exchange of debenture stock for its preferred stock and the holding of the debenture stock of the Delaware corporation to an amount equal to the outstanding common stock of the New Jersey corporation, said New Jersey corporation has done no business and is not in process of liquidation.

XI.

The fair market value of the stock of the New Jersey corporation on the 30th day of September, 1915, was $795 per share, and the fair market value of the stock of said New Jersey corporation, after the execution of the contracts between two corporations, was,
132 on October 1, 1915, $100. The fair market value of the stock of the Delaware corporation, distributed as aforesaid, was, on October 1, 1915, $347.50 per share.

XII.

In making his income-tax return for the year 1915 plaintiff, upon the advice of counsel, did not include as income the 500 shares of stock of the Delaware corporation received by him as aforesaid, but attached a statement as to the receipt of said stock to his income-tax return stating he did not regard it as taxable income.

XIII.

After an investigation of his books the Commissioner of Internal Revenue, holding that the 500 shares of stock of the Delaware corporation was income, and that its market value when acquired by claimant, October 1, 1915, was $347.50 per share, assessed an additional tax against claimant upon the 31st day of December, 1919, for income claimed by him to be due from plaintiff for the year 1915 because of the receipt by him of said stock, said assessment being in the sum of $5,657.97. Plaintiff first filed a claim for the abatement of said assessment, but thereafter withdrew his said claim for abatement, and on February 20, 1920, paid to the collector of internal revenue at Wilmington, Del., under protest, the amount of said assessment, to wit, $5,657.97, and upon the same day filed with the collector his claim for refund, which was denied by the Commissioner of Internal Revenue, whereupon plaintiff brought this suit.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that plaintiff is entitled to recover the sum of $5,657.97.

It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of five thousand

x hundred and fifty-seven dollars and ninety-seven cents
5,657.97).

OPINION.

33

Booth, Judge, delivered the opinon of the court:

The plaintiff was the owner of 250 shares of the E. I. duPont le Nemours Powder Co., a New Jersey corporation. In September, 915, a complete reorganization of the business of the company took place, and as the result of the same the plaintiff found himself the owner of his original shares in the New Jersey corporation and 500 shares in the new Delaware corporation. The defendants treated he new 500 shares of stock in the Delaware corporation as income, nd assessed against them at their fair market value an income tax of $5,657.97, which plaintiff paid under protest. The facts are in no wise controverted and the findings disclose the exact situation.

In Eisner v. Macomber, 252 U. S. 189, 207, the Supreme Court, speaking of income, said:

"The gain derived from capital, from labor, or from both combined, * * * profit gained through a sale or conversion of capital assets, * * * not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived,' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal—that is income derived from property. Nothing else answers the description."

Again in the same case the Supreme Court used the following language (p. 206):

"In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the amendment, and that the latter also may have proper effect,

134 it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress can not by any definition it may adopt conclude the matter, since it can not by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised."

Subjecting the facts herein to the rule announced, we find as the admitted status the following situation, viz: On September 30, 1915, the plaintiff's 250 shares in the New Jersey corporation were worth on the market $795 each, or the total sum of $198,750. On October 1, 1915, the day he received his 500 shares additional in the new Delaware corporation, his 250 shares in the New Jersey corporation decreased in value $695 a share, and were then marketable at $100 per share, while the 500 new shares he received were worth in the open market $347.50 each, or a total value of $173,750. Adding this amount to the decreased value of his New Jersey corporation stock,

we find the plaintiff in exactly the same situation as to the value of his holdings in both corporations that he was prior to the reorganization. The figures indisputably demonstrate that by the transaction the plaintiff did not gain or lose a penny, as will with more precision appear from the following tabulation:

Sept. 30, 1915, 250 shares of stock of the New Jersey corporation, at $795 each	$198,750
Total value Oct. 1, 1915	198,750
Oct. 1, 1915, 500 shares of stock of the Delaware corporation at $347.50	173,750
Oct. 1, 1915, 250 shares of stock of the New Jersey corporation, at $100	25,000
Total value of the 750 shares in both	198,750

As a matter of fact if the position of the defendants is to be sustained the plaintiff herein instead of receiving an income
135 from the transaction, loses $5,657.97, which he must pay from gains derived from a source other than the one in controversy, or out of his original investment.

The defendant contends that the New Jersey and Delaware corporations must be regarded as "separate and distinct legal entities" and that the case is within the rule of Peabody v. Eisner, 247 U. S. 347. We think the whole transaction is to be regarded as merely a financial reorganization of the business of the company and that this view is justified by the power and duty of the court to look through the form of the transaction to its substance. In Eisner v. McComber, 252 U. S. 189, at 213, it is said:

"We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable without apportionment."

It seems incredible that Congress intended to tax as income a business transaction which admittedly produced no gain, no profit, and hence no income. If any income had accrued to the plaintiff by reason of the sale and exchange made it would doubtless be taxable.

Judgment will be awarded the plaintiff in the sum of $5,657.97. It is so ordered.

Graham, judge; Hay, judge; Downey, judge; and Campbell, chief justice, concur.

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136 EXHIBIT 19 TO AFFIDAVIT.

Supreme Court of the United States. No. 260. October Term, 1921.

United States of America, appellant, v. C. W. Phellis.

Appeal from the Court of Claims.

(Nov. 21, 1921.)

Mr. Justice Pitney delivered the opinion of the court:

The court below sustained the claim of C. W. Phellis for a refund of certain moneys paid by him under protest in discharge of an addi-

ional tax assessed against him for the year 1915, based upon alleged income equivalent to market value of 500 shares of stock of a Delaware corporation called the E. I. duPont de Nemours & Co., received by him as a dividend upon his 250 shares of stock of E. I. duPont de Nemours Powder Co., a New Jersey corporation. The United States appeals.

From the findings of the Court of Claims, read in connection with claimant's petition, the following essential facts appear: In and prior to September, 1915, the New Jersey company had been engaged for many years in the business of manufacturing and selling explosives. Its funded debt and its capital stock at par values were as follows:

5% mortgage bonds	$1,230,000
4½% 30-year bonds	14,166,000
Preferred stock ($100 shares)	16,068,600
Common stock ($100 shares)	29,427,100
Total	60,891,700

It had an excess of assets over liabilities showing a large
137 surplus of accumulated profits; the precise amount is not important, except that it should be stated that it was sufficient to cover the dividend distribution presently to be mentioned. In that month a reorganization and financial adjustment of the business was resolved upon and carried into effect with the assent of a sufficient proportion of the stockholders, in which a new corporation was formed under the laws of Delaware with an authorized capital stock of $240,000,000, to consist in part of debenture stock bearing 6 per cent cumulative dividends, in part of common stock; and to this new corporation all the assets and good will of the New Jersey company were transferred as an entirety and as a going concern as of October 1, 1915, at a valuation of $120,000,000, the new company assuming all the obligations of the old except its capital stock and funded debt. In payment of the consideration the old company retained $1,484,100 in cash to be used in redemption of its outstanding 5 per cent mortgage bonds, and received $59,661,700 par value in debenture stock of the new company (of which $30,234,600 was to be used in taking up, share for share and dollar for dollar, the preferred stock of the old company and redeeming its 30-year bonds), and $58,854,200 par value of the common stock of the new company, which was to be and was immediately distributed among the common-stock holders of the old company as a dividend, paying them two shares of the new stock for each share they held in the old company. This plan was carried out by appropriate corporate action; the new company took over all the assets of the old company, and that company, besides paying off its 5 per cent bonds, acquired debenture stock of the new company sufficient to liquidate its 4½ per cent 30-year bonds and retire its
138 preferred stock, additional debenture stock equal in amount at par to its own outstanding common stock, and also two shares of common stock of the Delaware corporation for each share

of the outstanding common stock of the New Jersey corporation. Each holder of the New Jersey company's common stock (including claimant) retained his old stock and besides received a dividend of two shares for one in common stock of the Delaware company, and the New Jersey corporation retained in its treasury 6 per cent debenture stock of the Delaware corporation equivalent to the par value of its own outstanding common stock. The personnel of the stockholders and officers of the two corporations was on October 1, 1915, identical, the new company having elected the same officers as the old; and the holders of common stock in both corporations had the same proportionate stock holding in each. After the reorganization and the distribution of the stock of the Delaware corporation, the New Jersey corporation continued as a going concern, and still exists, but, except for the redemption of its outstanding bonds, the exchange of debenture stock for its preferred stock and the holding of debenture stock to an amount equivalent to its own outstanding common and the collection and disposition of dividends thereon, it has done no business. It is not, however, in process of liquidation. It has received as income upon the Delaware company's debenture stock held by it dividends to the amount of 6 per cent per annum, which it has paid out to its own stockholders, including the claimant. The fair market value of the stock of the New Jersey corporation on September 30, 1915, prior to the reorganization, was $795 per share, and its fair market value, after the execution of the contracts between the two corporations, was on October 1, 1915,
139 $100 per share. The fair market value of the stock of the Delaware corporation distributed as aforesaid was on October 1, 1915, $347.50 per share. The Commissioner of Internal Revenue held that the 500 shares of Delaware company stock acquired by claimant in the distribution was income of the value of $347.50 per share and assessed the additional tax accordingly.

The Court of Claims, observing that from the facts as found claimant's 250 shares of stock in the New Jersey corporation were worth on the market, prior to the transfer and dividend, precisely the same that the same shares plus the Delaware company's shares received by him were worth thereafter, and that he did not gain any increase in the value of his aggregate holdings by the operation, held that the whole transaction was to be regarded as merely a financial reorganization of the business of the company, producing to him no profit and hence no income, and that the distribution was in effect a stock dividend nontaxable as income under the authority of Eisner v. Macomber (252 U. S. 189), and not within the rule of Peabody v. Eisner (247 U. S. 347).

We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the sixteenth amendment and income tax laws enacted thereunder. In a number of cases besides these just cited we have under varying conditions followed the rule. Lynch v. Turrish (247 U. S. 221); Southern Pa-

cific Co. v. Lowe (247 U. S. 330); Gulf Oil Corporation v. Lewellyn (248 U. S. 71).

The act under which the tax now in question was imposed (act of Oct. 3, 1913, ch. 16, 38 Stat. 114, 166–167), declares that income shall include, among other things, gains derived "from interest,
140 rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever." Disregarding the slight looseness of construction, we interpret "gains, profits, and income derived from * * * dividends," etc., as meaning not that everything in the form of a dividend must be treated as income, but that income derived in the way of dividends shall be taxed. Hence the inquiry must be whether the shares of stock in the new company received by claimant as a dividend by reason of his ownership of stock in the old company constituted (to apply the tests laid down in Eisner v. Macomber [252 U. S. 189, 207]) a gain derived from capital, not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in—that is, received or drawn by the claimant for his separate use, benefit, and disposal.

Claimant's capital investment was represented by his New Jersey shares. Whatever increment of value had accrued to them prior to September 30, 1915, by reason of the surplus profits that theretofore had been accumulated by the company was still a part of claimant's capital, from which as yet he had derived no actual and therefore no taxable income so far as the surplus remained undistributed. As yet he had no right to withdraw it or any part of it, could not have such right until action by the company or its proper representatives, and his interest still was but the general property interest of a stockholder in the entire assets, business, and affairs of the company—a capital interest, as we declared in Eisner v. Macomber, supra, (p. 208).

141 Upon the face of things, however, the transfer of the old company's assets to the new company in exchange for the securities issued by the latter, and the distribution of those securities by the old company among its stockholders, changed the former situation materially. The common stock of the new company, after its transfer to the old company and prior to its distribution, constituted assets of the old company which it now held to represent its surplus of accumulated profits—still, however, a common fund in which the individual stockholders of the old company had no separate interest. But when this common stock was distributed among the common-stockholders of the old company as a dividend, then at once—unless the two companies must be regarded as substantially identical—the individual stockholders of the old company, including claimant, received assets of exchangeable and actual value severed from their capital interest in the old company, proceeding from it as the result of a division of former corporate profits, and drawn by them sever-

ally for their individual and separate use and benefit. Such a gain resulting from their ownership of stock in the old company and proceeding from it constituted individual income in the proper sense.

That a comparison of the market value of claimant's share in the New Jersey corporation immediately before, with the aggregate market value of those shares plus the dividend shares immediately after the dividend showed no change in the aggregate—a fact relied upon by the Court of Claims as demonstrating that claimant neither gained nor lost pecuniarily in the transaction—seems to us a circumstance of no particular importance in the present inquiry.

142 Assuming the market values were a precise reflex of intrinsic values, they would show merely that claimant acquired no increase in aggregate wealth through the mere effect of the reorganization and consequent dividend, not that the dividend did not constitute income. There would remain the presumption that the value of the New Jersey shares immediately prior to the transaction reflected the original capital investment plus the accretions which had resulted through the company's business activities and constituted its surplus, a surplus in which until dividend made the individual stockholder had no proper interest except as it increased the valuation of his capital. It is the appropriate function of a dividend to convert a part of a surplus thus accumulated from property of the company into property of the individual stockholders, the stockholder's share being thereby released to and drawn by him as profits or income derived from the company. That the distribution reduces the intrinsic capital value of the shares by an equal amount is a normal and necessary effect of all dividend distributions—whether large or small and whether paid in money or in other divisible assets—but such reduction constitutes the dividend none the less income derived by the stockholder if it represents gains previously acquired by the corporation. Hence, a comparison of aggregate values immediately before with those immediately after the dividend is not a proper test for determining whether individual income, taxable against the stockholder, has been received by means of the dividend.

The possibility of occasional instances of apparent hardship in the incidence of the tax may be conceded. Where, as in this case, the dividend constitutes a distribution of profits accumulated during an extended period and bears a large proportion to the par value

143 of the stock, if an investor happened to buy stock shortly before the dividend, paying a price enhanced by an estimate of the capital plus the surplus of the company, and after distribution of the surplus, with corresponding reduction in the intrinsic and market value of the shares, he were called upon to pay a tax upon the dividend received, it might look in his case like a tax upon his capital. But it is only apparently so. In buying at a price that reflected the accumulated profits, he of course acquired as a part of the valuable rights purchased the prospect of a dividend from the accumulations—bought "dividend on," as the phrase goes—and necessarily took subject to the burden of the income tax proper to

be assessed against him by reason of the dividend if and when made. He simply stepped into the shoes, in this as in other respects, of the stockholder whose shares he acquired, and presumably the prospect of a dividend influenced the price paid, and was discounted by the prospect of an income tax to be paid thereon. In short, the question whether a dividend made out of company profits constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand.

There is more force in the suggestion that, looking through and through the entire transaction out of which the distribution came, it was but a financial reorganization of the business as it stood before, without diminution of the aggregate assets or change in the general corporate objects and purposes, without change of personnel either in officers or stockholders, or change in the proportionate interest of any individual stockholder. The argument, in effect, is that there was no loss of essential identity on the part of the company, only a change of the legal habiliments in which the aggregate cor-
144 porate interests were clothed, no substantial realization by individual stockholders out of the previous accumulation of corporate profits, merely a distribution of additional certificates indicating an increase in the value of their capital holdings. This brings into view the general effect of the combined action of the entire body of stockholders as a mass.

In such matters, what was done, rather than the design and purpose of the participants, should be the test. However, in this case there is no difference. The proposed plan was set out in a written communication from the president of the New Jersey corporation to the stockholders, a written assent signed by about 90 per cent of the stockholders, a written agreement made between the old company and the new, and a bill of sale made by the former to the latter, all of which are in the findings. The plan as thus proposed and adopted, and as carried out, involved the formation of a new corporation to take over the business and the business assets of the old; it was to be and was formed under the laws of a different State, which necessarily imparts a different measure of responsibility to the public, and presumably different rights between stockholders and company and between stockholders inter se, than before. The articles of association of neither company is made to appear, but in favor of the asserted identity between the companies we will assume (contrary to the probabilities) that there was no significant difference here. But the new company was to have authorized capital stock aggregating $240,000,000—nearly four times the aggregate stock issues and funded debt of the old company—of which less than one-half ($118,-
515,900) was to be issued presently to the old company or its
145 stockholders, leaving the future disposition of a majority of the authorized new issues still to be determined. There was no present change of officers or stockholders, but manifestly a continuation of identity in this respect depended upon continued unani-

mous consent or concurrent action of a multitude of individua
stockholders actuated by motives and influences necessarily to som
extent divergent. In the light of all this we can not regard the ne
company as virtually identical with the old, but must treat it as
substantial corporate body with its own separate identity, and it
stockholders as having property rights and interests materially dif
ferent from those incident to ownership of stock in the old company

The findings show that it was intended to be established as such
and that it was so created in fact and in law. There is nothing t
warrant us in treating this separateness as imaginary, unless th
identity of the body of stockholders and the transfer in solido of th
manufacturing business and assets from the old company to the ne
necessarily have that effect. But the identity of stockholders wa
but a temporary condition, subject to change at any moment at th
option of any individual. As to the assets, the very fact of thei
transfer from one company to the other evidenced the actual separat
ness of the two companies.

But, further, it would be erroneous, we think, to test the questio
whether an individual stockholder derived income in the true an
substantial sense through receiving a part in the distribution of th
new shares by regarding alone the general effect of the reorganiza
tion upon the aggregate body of stockholders. The liability of
stockholder to pay an individual income tax must be tested by th
effect of the transaction upon the individual. It was a part
146 the purpose and a necessary result of the plan of reorganiz
tion, as carried out, that common stock of the new company t
the extent of $58,854,200 should be turned over to the old compan
treated by it as assets to be distributed as against its liability
stockholders for accrued surplus, and thereupon distributed to the
"as a dividend." The assent of the stockholders was based upon th
as a part of the plan.

In thus creating the common stock of the new company and tran
ferring it to the old company for distribution pro rata among i
stockholders, the parties were acting in the exercise of their righ
for the very purpose of placing the common-stockholders individual
in possession of new and substantial property rights in esse,
realization of their former contingent right to participate eventual
in the accumulated surplus. No question is made but that the pr
ceedings taken were legally adequate to accomplish the purpose. Th
new common stock became treasury assets of the old company, an
was capable of distribution as the manufacturing assets whose pla
it took were not. Its distribution transferred to the several stoc
holders new individual property rights which they severally were e
titled to retain and enjoy, or to sell and transfer, with precisely th
same substantial benefit to each as if the old company had acquire
the stock by purchase from strangers. According to the findings th
stock thus distributed was marketable. There was neither expre
nor implied condition, arising out of the plan of reorganization

otherwise, to prevent any stockholder from selling it; and he could sell his entire portion or any of it without parting with his capital interest in the parent company or affecting his proportionate
147 relation to the interests of other stockholders. Whether he sold the new stock for money or retained it in preference, in either case when he received it he received as his separate property a part of the accumulated profits of the old company in which previously he had only a potential and contingent interest.

It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit, derived from his capital interest in the old company, not in liquidation of the capital but in distribution of accumulated profits of the company; something of exchangeable value produced by and proceeding from his investment therein, severed from it and drawn by him for his separate use. Hence it constituted individual income within the meaning of the income tax law, as clearly as was the case in Peabody v. Eisner (247 U. S. 347).

Judgment of the Court of Claims reversed, and the cause remanded with directions to dismiss the suit.

DISSENTING OPINION.

Mr. Justice McReynolds: In the course of its opinion, citing Eisner v. Macomber (252 U. S. 189, 213), the Court of Claims declared:

"We think the whole transaction is to be regarded as merely a financial reorganization of the business of the company and that this view is justified by the power and duty of the court to look through the form of the transaction to its substance." And, further, "It seems incredible that Congress intended to tax as income a business transaction which admittedly produced no gain, no profit, and hence no income. If any income had accrued to the plaintiff by reason of the sale and exchange made it would doubtless be taxable."
148 There were perfectly good reasons for the reorganization, and the good faith of the parties is not questioned. I assume that the statute was not intended to put an embargo upon legitimate reorganizations when deemed essential for carrying on important enterprises. Eisner v. Macomber was rightly decided, and the principle which I think it announced seems in conflict with the decision just announced.

Mr. Justice Van Devanter concurs in this dissent.

149-150 JANUARY 24, 1920.

IT:IA:RAA:P.

JGB.

Mr. ALFRED I. DUPONT,
Wilmington, Delaware.

SIR: Reference is made to your letter dated January 1, 1920, addressed to the collector of internal revenue, Wilmington, Delaware, wherein you call attention to the fact that the demand for payment of the additional assessment due on your 1915 return is improper

and illegal, the act of October 3, 1913, limiting the assessment to "any time within three years after said return is due."

In reply you are advised that this assessment was made after careful consideration of evidence submitted in the report of the examining officer who examined your books and accounts on or about November 30, 1917, at a time well within the three-year limitation prescribed by paragraph E of the act of October 3, 1913, an abstract of which follows:

"All assessments shall be made * * * on or before the first day of June of each successive year * * * except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon discovery thereof, at any time within three years after said return is due, * * * and the assessment made * * * shall be paid by such person or persons immeditaely upon notification of the amount of such assessment."

The department holds, in construing the above-quoted provisions of law, that an understatement or omission of income constitutes a false or erroneous return; also that the three-year limitation provided therein is one applying to the time of discovery of tax liability and not to the time of assessing taxes.

151 In the case of additional tax liability on your 1915 income the discovery of the omission of certain dividends received by you during the year 1915 was made on or about November 30, 1917, a date falling within three years from the due date of filing your 1915 return, namely, March 1, 1916.

In view of the above this office is firmly of the opinion that the assessment in question is properly and legally made. Therefore, the demand notice dated January 10, 1920, is returned with the suggestion that you pay the tax as thereon indicated, thereby avoiding the collection of same by the collector of your district through distraint.

A copy of this letter will be furnished to the Collector of Internal Revenue for your district for his guidance and information.

Respectfully,

(Signed) G. V. NEWTON,
Acting Assistant to the Commissioner.

Enclosure:
Tax notice.
E.C.

In United States District Court. Opinion of the court.

(Filed June 13, 1922.)

Upon plaintiff's motion for preliminary injunction and defendant's motion to dismiss bill.

Thompson, J.

From the allegations of the bill and supporting affidavit and the defendant's affidavit, the following facts appear:

On September 30, 1913, the plaintiff was the owner of 37,767 shares of the common stock of the E. I. duPont de Nemours Powder Company, incorporated in 1903 under the laws of New Jersey, hereinafter called the New Jersey Company.

152 On October 1, 1915, the New Jersey Company transferred its assets as an entirety and as a going concern to E. I. duPont de Nemours and Company, incorporated under the laws of Delaware and hereinafter called the Delaware Company.

As part of the plan of reorganization, each stockholder of the New Jersey Company received two shares of the common stock of the Delaware Company for each share of common stock held by him in the New Jersey Company. The plaintiff received, on or about October 1, 1915, a total of 75,554 shares of the common stock of the Delaware Company of the par value of $100 per share.

On February 19, 1916, the plaintiff filed his income tax return under the act of October 3, 1913, and on March 4, 1916, filed an amended return of his income for 1915. The plaintiff did not, however, return nor pay tax upon the said stock dividend as part of his income. The plaintiff believes he attached to his return a statement in writing fully setting forth the entire transaction under which he received the stock and protesting against its inclusion in his income for the year 1915, but the fact that he did attach such statement is neither averred nor proved.

On January 1, 1920, the plaintiff received through the mails a notice and demand dated December 31, 1919, that he pay to the defendant as collector of internal revenue on or before January 10, 1920, the sum of $1,576,015.86 for income tax for the year 1915.

It appears that on November 27, 1917, Income Tax Inspector DuRoss made a report to the revenue agent in charge at Baltimore, Maryland, in which he reported among other things that the plaintiff had received as income, during the year 1915, 200 per cent in common-stock dividends distributed by the E. I. duPont de Nemours Powder Company previously omitted. DuRoss made a further report on July 22, 1919, as a result of which, and of other investigations, the Commissioner of Internal Revenue made an amended return upon such information as provided for by section 2E of the act of October 3, 1913. The evidence clearly shows

153 that this amended return was made not earlier than July 22, 1919, and that the assessment of the additional tax claimed was not made until December, 1919. The plaintiff avers that the defendant intends to proceed to collect the additional taxes referred to in the notice and demand of December 31, 1919, by distress and sale of the plaintiff's lands and freehold in the district of Delaware; that the result would be an irreparable injury to the plaintiff and deprive him of any remedy for contesting the validity of the assessment or the amount thereof; and he prays for an injunction restraining the defendant from distraining or attempting to distrain to collect the sum of $1,576,015.86.

It is claimed that under the provision of section E of the income tax act of 1913 no return could be made by the commissioner after the expiration of three years from March 1, 1916, and no assessment made thereon after the expiration of three years from June 1, 1916. No return or assessment was made within the prescribed time.

Further objections are that the alleged return, not made until July, 1919, or thereafter, was not made by the officials authorized by law, was not made according to the form prescribed, and that the assessment was not based upon the alleged return.

The stock dividend upon which it is attempted to hold the defendant liable has been held by the Supreme Court to be taxable income. U. S. vs. Phellis, 260, October Term, 1921, 42 Sup. Ct. 63. We have therefore a lawful tax upon income for the year 1915, for which the plaintiff should have made return for that year. But the plaintiff contends that the amended return made for him by the commissioner and the assessment thereon were not made according to law, and therefore are invalid, and that no suit or proceeding may now be brought upon such invalid return and assessment.

Section E of the income tax act of 1913, 38 Stat. at Large, 169, after providing for assessment and notice before June 1 of
154 each successive year and that assessment shall be paid on or before June 30, provides that, in case of refusal or neglect to make such return and cases of false or fraudulent returns, the commissioner "shall, upon the discovery thereof, at any time within three years after the return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment.

It is conceded that the plaintiff's return was incorrect and was therefore "false" within the meaning of the section above cited. Woods vs. Lewellyn, 252 Fed. 106; Eliot National Bank vs. Gill, 218 Fed. 600; National Bank of Commerce vs. Allen, 223 Fed. 472.

The plaintiff, therefore, urges that as the return prepared by the commissioner was not made within three years after the plaintiff's return was due on March 1, 1916, and the assessment was not made within three years from June 1, 1916, no suit or proceedings may be begun by the collector for recovery of the tax based thereon. The question as to whether the three years within which a return may be made runs from the time of the discovery or from the time when the return is due has been held against the plaintiff in a dictum in Eliot National Bank vs. Gill, 218 Fed. 600, but the point was not expressly before the court either in that case or in Woods vs. Lewellyn, 252 Fed. 106, where the inference is to the contrary. The subject is discussed in Montgomery's Tax Procedure, ed. 1921, page 170, footnote 18, and the opinion of the author is that the punctuation conveys a very clear meaning that the discovery and

he assessment must be made within three years from the time when he return is due.

These considerations, however, all go to the question of the invalidity of the return and assessment and can not be raised in this proceeding in view of the inhibition of section 3224, R. S., providing

"No suit for the purpose of restraining the assessment or col-
155 lection or any tax shall be maintained in any court," and the rulings of the Supreme Court holding that Congress "has provided a complete system of corrective justice in regard to all taxes imposed by the General Government, including provisions for recovering the tax after it has been paid, by suit against the collector, and therefore the taxpayer has no recourse to the courts until after the money is paid." State Railroad Tax cases, 92 U. S. 575, 613.

Therefore, it must be held that the remedy by injunction will not lie unless because the plaintiff, through the threatened action of the collector to collect through distraint, is deprived of any redress at law, the effect of sec. 3224 upon the facts of this case has been modified by subsequent legislation.

By the revenue act of November 23d, 1921, sec. 250(d), Statutes at Large, page 263, it is provided: "No suit or proceeding for the collection of any such taxes due under this act or under prior income, excess profits, or war tax acts, or of any taxes due under section 38 of such act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed," etc.

As the plaintiff's return was filed in March, 1916, I see no escape from the conclusion that the above provisions of the act of 1921 interposes a limitation upon suits or proceedings which expired in 1921. Moreover, sec. 1320 of the act of 1921 provided: "That no suit or proceeding for the collection of any internal revenue tax shall be begun after the expiration of five years from the time such tax was due except in the case of fraud with the intent to evade tax or wilful attempt in any manner to defeat or evade tax. This section shall not apply to suits or proceedings for the collection of taxes under section 250 of this act nor to suits or proceedings begun at the time of the passage of this act."

The latter paragraph of the above section was apparently inserted because section 250 contains its own provisions for limitations
156 of time of making assessments, extension with the consent of the taxpayer, and limitation of time for beginning suits or proceedings.

Under the general system for collection of taxes it would no doubt be held that the plaintiff's remedy would be to pay the tax under protest and bring suit against the collector to recover it back. But the plaintiff argues that, if he should pay the tax to the collector, he would on several grounds be debarred from setting up as a basis of recovery against the collector, either that the return made by the commissioner or the assessment was invalid or that the stock of the Delaware Company received by the plaintiff was assessed in excess

of its fair value for the purpose of determining the tax. To sustain this contention the plaintiff cites section 252 of the revenue act of 1918, reenacted as section 252 of the revenue act of 1921, as follows: "If upon examination of any return of income made pursuant to * * * the act of October 3, 1913, * * * it appears that an amount of income * * * tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income * * * taxes, or instalments thereof then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due unless before the expiration of such five years a claim therefor is filed by the taxpayer."

As the five years from the date when the return was due, namely, March 1916, has long since expired, the plain meaning of the above section is that no credit or refund could now be lawfully allowed or made because no claim therefor was filed by the plaintiff within the five years. It is evident that Congress intended by the provisions of sec. 250(d) of the act of 1921 to provide a definite five-year limitation for the beginning of suits or proceedings for the collec-
157 tion of taxes enumerated. If the revenue officers should unduly delay the assessment of taxes and the commencement of proceedings for collection, Congress has determined that five years after the due day of the return is a reasonable time to bring to an end the right to collect.

On the other hand, Congress has placed a limitation upon the taxpayer by the provision of sec. 252 of the act of 1921 as to claims for taxes paid in excess of those lawfully due. If the plaintiff pays the amount demanded, no remedy at law is left open to him for the recovery of such excess.

If a suit were begun against the taxpayer after the running of the statute of limitations, he could assert as a defense the various grounds urged in support of the present bill. But if the collector should proceed to seize and sell the plaintiff's property, he would be deprived of any remedy excepting a suit at law against the collector. Meanwhile, his freehold and property would have been subject to seizure and sale and his remedy at law would not adequately repair such injury.

As was said in Ogden City vs. Armstrong, 168 U. S. 224, "In Union Pacific Railway vs. Cheyenne, 113 U. S. 516, 525, this court, through Mr. Justice Bradley said:

"But it is contended that the complainant should have sought a remedy at law and not in equity. It can not be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax, for it must be presumed that the law furnishes a remedy for

illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or to be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the
158 loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief."

The language of Mr. Justice Bradley applies aptly to the situation in the instant case. While section 3224 has been strictly construed in view of the remedial system providing for remedies of the taxpayer against the imposition of illegal taxes following Mr. Justice Blatchford's comprehensive discussion of the subject in Snyder v. Marks, 109 U. S. 189, Congress has since added to the system the limitations contained in the act of 1921 and reading these new provisions in connection with section 3224, I can not conceive that Congress intended the taxpayer to be rigidly held to the inhibitions of section 3224 if the effect should be to nullify the inhibitions against the officers of the revenue contained in the later statutes and thus to subject the taxpayer to proceedings by distraint without leaving him an adequate remedy at law, after the limitation had run against the collector's right to begin such proceeding. It would be contrary to equity to hold that, where no remedy is available at law, equity will fail to afford relief.

The views herein expressed are deemed sufficient to support a preliminary injunction without going into a discussion of other contentions raised by the bill. The motion to dismiss is denied.

A preliminary injunction may issue restraining the defendant from proceeding by distraint or attempting to collect by distraint the taxes claimed, without, however, including therein restraint against collection by suit. An appropriate decree may be prepared by counsel.

In United States District Court. Motion to amend bill.

(Filed June 27, 1922.)

Comes now the complainant in the above-named cause and
159 shows to the court that since the said bill was filed, the term of office of Harry T. Graham as United States collector of internal revenue for the district of Delaware has expired, and that John W. Hering has been appointed, and is now exercising the duties of United States collector of internal revenue for the district of Delaware, and therefore complainant moves the court that he may have leave to amend his bill by adding the name of the said John W. Her-

ing, individually and as United States collector of internal revenue for the district of Delaware, and his successor, as defendants thereto, with apt words to charge him and them.

(Sgd.) WM. A. GLASGOW, JR.,
(Sgd.) HENRY P. BROWN,
(Sgd.) ROBERT PENINGTON,
Counsel for Complainant.

In United States District Court. Decree.

(Filed June 27, 1922.)

This cause came on to be heard this 6th day of June, 1922, after having been argued by counsel; and thereupon, it appearing to the court that the term of office of said Harry T. Graham as United States collector of internal revenue for the district of Delaware, has expired, and that John W. Hering has been appointed as, and is now exercising the duties of the office of United States collector of internal revenue for the district of Delaware, it is ordered that the said John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, and his successor in office, be, and he and they are hereby, made parties defendant in this cause;

And the said John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, having appeared as defendant by James H. Hughes, jr., United States attorney, it is further ordered, adjudged and decreed as follows, to wit:

1. That the motion of the defendants to dismiss the plaintiff's bill be, and the same is hereby, overruled.

160 2. That the defendant, Harry T. Graham, individually and as United States collector of internal revenue for the district of Delaware, his agents or representatives, and John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, his agents, representatives, successor or successors, be and they are, and each of them is, hereby enjoined and restrained, until the further order of this court, from proceeding to collect, or attempting to collect, by distraint, the sum of one million, five hundred seventy-six thousand, fifteen dollars and eighty-six cents ($1,576,015.86) or any part thereof, claimed by the defendant against the plaintiff, Alfred I. duPont, by reason of the receipt by him of 75,534 shares of the common stock of the E. I. duPont de Nemours Company on or about October 1, 1915.

3. This injunction, however, shall not operate to prevent a suit by the United States in a court having jurisdiction thereof, to recover from the said Alfred I. duPont any sum or sums of money which the United States may be advised it is entitled to.

(Sgd.) J. W. THOMPSON, J.

In United States District Court. Petition for Appeal.

(Filed July 25, 1922)

To the honorable the Judge of the District Court of the United States for the district of Delaware.

And now, to wit, this 25th day of July, A. D. 1922, comes Harry T. Graham, individually and as United States collector of internal revenue for the district of Delaware, and John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, defendants in the above-entitled cause, by James H. Hughes, jr., Esq., United States attorney for the district of Delaware, their solicitor, and believing themselves aggrieved
161 by the decree of this court entered on the 27th day of June, A. D. 1922, granting a preliminary injunction against them in favor of the plaintiff in the cause, do hereby appeal therefrom to the United States Circuit Court of Appeals for the Third Circuit and pray that this appeal may be allowed and citation granted directed to the above-named plaintiff, Alfred I. duPont, commanding him to appear before the United States Circuit Court of Appeals for the Third Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record and proceedings in said cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, and in connection with this petition, the Petitioners herewith present their assignments of error.

HARRY T. GRAHAM,
Individually and as United States Collector of Internal Revenue for the District of Delaware,
JOHN W. HERING,
Individually and as United States Collector of Internal Revenue for the District of Delaware,
By JAMES H. HUGHES,
Solicitor.

In United States District Court. Order.

(Filed July 25, 1922.)

And now, to wit, this 25th day of July, A. D. 1922, the defendants to the cause, having filed their petition for an appeal from the decree made and entered herein on the 27th day of June, A. D. 1922:

It is ordered by the court that an appeal be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Third Circuit the said decree.

(Sgd.) J. W. THOMPSON, J.

162 In United States District Court. Assignments of error.

(Filed July 25, 1922.)

And now, to wit, this 25th day of July, A. D. 1922, comes the defendants in the above-entitled cause by James H. Hughes, jr., Esq., their solicitor, and in connection with their appeal, say that in the record and proceedings and in the decree aforesaid, made and entered therein on the 27th day of June, A. D. 1922, there is manifest error to the prejudice of the defendants, and for said error, the said defendants assign the following:

(1) The court erred in overruling defendants' motion to dismiss the bill.

(2) The court erred in granting plaintiff's motion for a preliminary injunction.

(3) The court erred in holding that the plaintiff had no adequate remedy at law.

(4) That court erred in holding that if the plaintiff had paid the tax in response to the assessment and demand his right to recover back the same, if illegally or erroneously assessed and collected, would be barred by sections 250 (d) and 252 of the revenue act approved November 23rd, 1921.

Wherefore, the defendants pray that the said decree be reversed.

HARRY T. GRAHAM,
Individually and as United States Collector of Internal Revenue for the District of Delaware,
JOHN W. HERING,
Individually and as United States Collector of Internal Revenue for the District of Delaware,
By JAMES H. HUGHES,
Solicitor.

163 In United States District Court. Citation and service.

(Filed July 26, 1922.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Alfred I. duPont:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Third Circuit in the city of Philadelphia, State of Pennsylvania, on the 24th day of August, A. D. 1922, pursuant to an appeal duly obtained from an interlocutory decree of the United States for the district of Delaware, wherein Harry T. Graham, individually and as United States collector for the district of Delaware, and John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, are appellants, and you are appellee, and show cause, if any there be, why said decree against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. Whitaker Thompson, sitting as judge of the District Court of the United States for the district of Delaware, at Philadelphia, State of Pennsylvania, this 25th day of July, A. D. 1922, and the Independence of the United States of America the one hundred and forty-sixth.

(Sgd.) J. W. THOMPSON,
United States District Judge.

Legal service accepted for Alfred I. duPont, appellee.

(Sgd.) WM. A. GLASGOW, Jr.,
Attorney.

JULY 26, 1922.

164 In United States District Court. Praecipe for transcript.

(Filed September 13, 1922.)

Please prepare and certify transcript of record in the above-entitled cause for filing in the United States Circuit Court of Appeals for the Third Circuit, including therein the following, viz:

1. Docket entries.
2. Bill of complaint with exhibit.
3. Affidavit of Alfred I. duPont.
4. Motion for preliminary injunction and order setting same down for hearing.
5. Motion to dismiss bill.
6. Affidavit of Harry T. Graham, defendant.
7. Exhibits referred to in affidavit of Harry T. Graham, defendant.
8. Opinion of court.
9. Motion to amend bill.
10. Decree.
11. Petition for appeal, order allowing appeal, and assignments of error.
12. Citation.
13. Praecipe for transcript of record.
14. Clerk's certificate.

(Sgd.) JAMES H. HUGHES, Jr.,
Solicitor for Defendants-Appellants.

To H. C. MAHAFFY, Esq.,
Clerk, U. S. District Court.

Service of a copy of the foregoing praecipe accepted this 22d day of August, A. D. 1922.

(Sgd.) WM. A. GLASGOW, Jr.,
Solicitor for Plaintiff-Appellee.

165 In United States District Court. Clerk's certificate.

UNITED STATES OF AMERICA,
District of Delaware, ss:

I, Henry C. Mahaffy, jr., clerk of the District Court of the United States for the District of Delaware, do hereby certify the fore-

going printed pages to be the transcript of record caused to be printed by James H. Hughes, jr., Esq., United States attorney for the district of Delaware and attorney for the defendant, and presented to me by said attorney for certification as such transcript of record in the case of Alfred I. duPont v. Harry T. Graham, individually and as United States collector of internal revenue for the district of Delaware, et al., No. 457, in equity, pending in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Wilmington, in said district, this twenty-fifth day of October, A. D. 1922.

[SEAL.] (Sgd.) H. C. MAHAFFY, Jr.,
Clerk U. S. District Court, District of Delaware.

166 United States Circuit Court of Appeals for the Third Circuit. No. 2920 (list No. 58). October term, 1922.

(Title omitted.)

Order assigning Bodine, J., to sit with court.

(Filed Dec. 6, 1922.)

Appeal from the District Court of the United States for the district of Delaware.

And now, to wit, this fifth day of December, A. D. 1922, it is ordered that Hon. Joseph L. Bodine, district judge for the district of Delaware, be, and he is hereby, assigned to sit in above case in order to make a full court.

Per curiam.

BUFFINGTON, *Circuit Judge.*

(File endorsement omitted.)

167 *Per curiam opinion.*

(Filed Jan. 3, 1923.)

In the United States Circuit Court of Appeals for the Third Circuit.
No. 2920. October term, 1922.

HARRY T. GRAHAM, INDIVIDUALLY AND AS UNITED STATES collector of internal revenue for the district of Delaware, and John W. Hering, individually and as United States collector of internal revenue for the district of Delaware, and his successor in office, defendants-appellants,

vs.

ALFRED I. DUPONT, PLAINTIFF-APPELLEE.

Appeal from the District Court of the United States for the district of Delaware.

Before Buffington and Davis, circuit judges, and Bodine, district judge.

Per curiam.

In this case the court below granted a preliminary injunction "restraining the defendant from proceeding by distraint or attempting to collect by distraint the taxes claimed, without, however, including therein restraint against collection by suit." Such action by the court was based on reasons stated by it in an opinion printed herewith in the margin.

In declining, as we do, to vacate or modify the order granted by the court below, and in affirming its decree, we base our decision on its opinion which we adopt as expressive of our views.

The decree below is affirmed.

Opinion, Thompson, J. (Omitted. Printed, p. 151.)

168 [Omitted.]

169 [Omitted.]

170 (File endorsement omitted.)

171 In the United States Circuit Court of Appeals for the Third Circuit. No. 2920 (list No. 58). October term, 1922.

(Title omitted.)

Decree.

(Filed Jan. 3, 1923.)

Appeal from the District Court of the United States for the district of Delaware.

This cause came on to be heard on the transcript of record from the District Court of the United States for the district of Delaware, and was argued by counsel.

On consideration whereof, it is nowhere ordered, adjudged, and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, January 3, 1922.

Per curiam.

BUFFINGTON, *Circuit Judge.*

(File endorsement omitted.)

172 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct.

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circu't, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this court in the case of Harry T. Graham et al., appellants, vs. Alfred U. duPont, appellee, No. 2920, on file, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this seventeenth

day of January, in the year of our Lord one thousand nine hundre
and twenty-three and of the independence of the United States th
one hundred and forty-seventh.

[SEAL.] SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.

173 *Writ of certiorari and return.*

(Filed Mar. 22, 1923.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable th judges of the United States Circuit Court of Appeals for th Third Circuit, greeting:

Being informed that there is now pending before you a suit i which Harry T. Graham, individually and as United States collecto of internal revenue for the district of Delaware, and John W. Hering individually and as United States collector of internal revenue fo the district of Delaware, and his successor in office, are appellant and Alfred I. duPont is appellee, No. 2920, which suit was remove into the said Circuit Court of Appeals by virtue of an appeal fro the District Court of the United States for the District of Delawar and we, being willing for certain reasons that the said cause and th record and proceedings therein should be certified by the said Circu

Court of Appeals and removed into the Supreme Court of th
174 United States, do hereby command you that you send witho
delay to the said Supreme Court, as aforesaid, the record an proceedings in said cause, so that the said Supreme Court may a thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of th United States, the twelfth day of March, in the year of our Lord on thousand nine hundred and twenty-three.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

175 (File endorsement omitted.)

176 In the United States Circuit Court of Appeals for the Thi Circuit.

(Title omitted.)

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the abov entitled cause that the certified copy of the transcript of the reco now on file in the Supreme Court of the United States shall cons tute the return of the clerk of the United States Circuit Court

Appeals for the Third Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
WM. A. GLASGOW, Jr.,
Counsel for Respondent.

MARCH 15, 1923.
Endorsements:
2920.
Stipulation of counsel received & filed, Mar. 21, 1923.
SAUNDERS LEWIS, Jr.,
Clerk.

177 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel to be used as return to writ of certiorari in the case of Harry T. Graham, collector, et al., petitioner, vs. Alfred I. duPont, respondent, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 21st day of March, in the year of our Lord one thousand nine hundred and twenty-two and of the independence of the United States the one hundred and forty-seventh.

[SEAL.] SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

178 [Blank.]

179 (File endorsement omitted.)

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1923